John Adams
Library,

IN THE CUSTODY OF THE
BOSTON PUBLIC LIBRARY.

SHELF Nº
ADAMS
161.6

THE

LIFE

OF

SIR MICHAEL FOSTER, KNT.

SOMETIME ONE OF THE JUDGES OF THE COURT OF KING'S BENCH,

AND

RECORDER OF BRISTOL.

BY HIS NEPHEW,

THE LATE MICHAEL DODSON, ESQ.

BARRISTER AT LAW.

LONDON:

PRINTED FOR J. JOHNSON AND CO.

ST. PAUL'S CHURCH-YARD.

M,DCCC,XI.

PREFACE.

THE following Life of Sir Michael Foster, distinguished for his learning, his integrity, and his attachment to the constitution of his country, was written, as stated in the title-page, by his nephew, the late Michael Dodson, esq. It was communicated by him to Dr. Kippis, the editor of the second, or "corrected and enlarged" edition of the *Biographia Britannica;* and constituted the last article that was printed for the intended sixth volume of that work.

This biographical communication was dated, by its author, February 7, 1795, and Dr. Kippis died the 8th of the following October. His death occasioned an interruption in the publication of such edition, which has not since been resumed or continued. And the dreadful fire

fire that happened at Mr. Nichols's house, printing-office, and warehouse, in the night of February 8th, 1808, destroyed, with many other very valuable works, the whole impression of so much of the unfinished volume as had been printed[a].

At the time that Mr. Dodson communicated his manuscript, he superintended the printed proof sheets of the article he had written; and Mr. Nichols, in the name of himself and his co-proprietors, obligingly presented Mr. Dodson with half a dozen copies for his private use.

This liberal conduct of the printer has eventually preserved these pages from the dire conflagration, and enabled the editor to indulge his own judgment in reviving and preserving this account of Sir Michael Foster, and to repeat the affectionate regard which he retains, unimpaired by time, for that learned judge's no less learned nephew and biographer.

The humble testimony which the editor has, on a former occasion, borne to the character of Mr. Dodson, who died November 13th, 1799, was the tribute of personal regard, but it was

[a] See Mr. Nichols's very modest, but very interesting, statement of the dreadful devastation of literary property in this fire, and his very affecting reflections on his loss of the result of his own unremitting labours—*Gentleman's Magazine for Feb.* 1808, *vol.* lxxviii. *p.* 99.

also

also the tribute of justice. The form in which he printed that memoir of his much-respected friend necessarily confined it to private circulation; but it has subsequently been inserted, almost entire, in the "General Biography" by Dr. Aikin and Mr. Morgan, to which the inquiring reader is referred.

Sir John-Eardley Wilmot, late lord chief-justice of the court of common pleas, was the particular friend of Mr. justice Foster; and Mr. Wilmot, in his "Memoirs" of his very justly-honored father, has inserted some short correspondence on legal subjects between these friends, and spoken of Mr. justice Foster in language significantly descriptive of his true character. "Sir Michael Foster," says he, "was conspicuous not only for his profound "knowledge of criminal law, but for every "quality of an upright, enlightened, and sagacious magistrate[b]."

And the memorable case of the keeper of one of the gates of Richmond-park, which is the subject of the clear and manly letter of Mr, afterwards lord, Thurlow (p. 85—88) is further noticed, with some remarks by Mr. Wake-

[b] See "Memoirs" prefixed to "Notes on opinions and judgments, &c. by sir John-Eardley Wilmot, knt. late lord chief-justice of the court of common pleas;" p. 13, 4to. 1802.

field,

field, bearing honourable testimony to Mr. justice Foster's highly-approved conduct on that trial[c].

JOHN DISNEY.

The Hyde, Sept. 28th, 1810.

c See "Memoirs of the Life of Gilbert Wakefield," vol. i. p. 229—265, 2d edit. 1804.

THE

THE LIFE

OF

SIR MICHAEL FOSTER.

SIR MICHAEL FOSTER was a native of Marlborough in Wiltshire, and was born December 16, 1689. His father and grand-father were Michael Foster[a] and John Foster, emi-

[a] He died in 1720, and a funeral-sermon was preached on the occasion by the famous Dr. Morgan, who was at that time the minister of a dissenting congregation in Marlborough. His text was, *Death is swallowed up in victory;* and, in speaking of the deceased, he thus expressed himself: "I think that the text hath been very fitly chosen "and recommended, as the subject of my discourse and "your meditations on this melancholy occasion, when we "are come together to pay the last public testimonial of "decency and respect to so excellent and useful a per-"son; who made it the business of his life to exemplify "the character of a real christian without any mixture "of the pharisee; who always studied and laboured to "promote righteousness and peace, as abstracted from "the uncatholick zeal and narrow-spiritedness of a party;

nent attorneys in that town. They were protestant dissenters, and, being such, were named as aldermen, and the latter as common-clerk, in the charter illegally granted to that town by James II. in September, in the fourth year of his reign: but as they were zealous friends of civil and religious liberty and the rights of mankind, they refused to be sworn and to act under it; and in the next month a proclama-

" who could be charitable and beneficent to others with-
" out coveting the reputation of it, and content himself
" with the testimony of a good conscience without mind-
" ing or regarding the applauses of men; and who, hav-
" ing fought a good fight, kept the faith, and finished his
" christian course in the simplicity of the gospel; there
" is from henceforth, without all controversy, a crown of
" righteousness laid up for him, which the Lord, the
" righteous judge, will give to him at that day, when this
" corruption shall have put on incorruption, and this
" mortal shall have put on immortality; and when this
" saying shall be fully accomplished, *Death is swallowed*
" *up in victory.*" This character, great as it may seem, is not greater than the subject of it deserved. Mr. justice Foster used to tell, that soon after his appearance as a barrister in the court of King's Bench, one of the judges inquired of an officer of the court for his name, and that the judge, being informed that he was the son of Mr. Foster of Marlborough, immediately said, " Then he is the son of one of the honestest men in " England." The above-mentioned sermon, in the hand-writing of Dr. Morgan, is in my possession: and the originals of all the letters to Mr. justice Foster hereafter cited are also in my possession.

tion

tion was issued for removing the new burgesses, and for restoring things to their former state. After attending the free-school in Marlborough a proper time, Mr. Foster removed to Oxford, being matriculated in that university May 7, 1705. He studied some years in Exeter college under the tuition of Mr. Osborne, a gentleman whom, in the subsequent part of his life, he always mentioned with respect. He was admitted into the society of the Middle Temple, May 23, 1707, and in due time was called to the bar in that society. He attended in Westminster-Hall some years after being called to the bar; but not having much success as an advocate, he retired into the country, and settled in his native town. Here he contracted an intimacy with Algernon earl of Hartford, afterwards duke of Somerset, which continued many years, and until the death of the noble duke; who by his will appointed his friend executor in trust with his son-in-law Hugh earl (afterwards duke) of Northumberland. In 1725 he married Martha, the eldest daughter of James Lyde, esq. of Stantonwick in Somersetshire; and in some few years afterwards he removed to Bristol, where he exercised his profession with great reputation and considerable success. And in August 1735 he was chosen recorder of the city, which office he retained many years. Soon after accepting this office, in Easter term 1736,

he took on him the degree of serjeant at law[b]. In the execution of the office of recorder, many curious and important cases came before him; particularly, the cases of captain Goodere, and his accomplices, for the murder of his brother sir John Dinely Goodere[c], of Alexander Broadfoot[d], and of William Nicholas[e].

[b] This was the last general call of serjeants, and fourteen gentlemen were at this time called. The motto on the rings was, *Nunquam libertas gratior.* See serjeant Wynne's Observations touching the antiquity and dignity of the degree of serjeant at law, printed in 1765, p. 22, 23, 104—123.

[c] See State Trials, VI. 795. edit. 1777. The captain and some of his friends were desirous that the trial should be at an admiralty-session; and the lords of the admiralty directed a consultation to be had by the attorney and solicitor-general, and other counsel, as to the mode of trying him. On the consultation, Mr. Dovey, the solicitor to the admiralty, was directed to write a letter to the recorder. I will give his letter and the recorder's answer, and also some letters which passed between the recorder and the attorney-general sir Dudley Ryder. Mr. Dovey's letter is dated February 5, 1740-1, O. S.

SIR,

My lords commissioners of the admiralty having directed a consultation by Mr. Attorney* and Mr. Solicitor-General†, Dr. Paul‡ and sir Edmund Isham‖, in what manner captain Goodere must be tried for the murder of

[d] See his Crown Law, 154—179. [e] Ibid. 64—70.

* Sir Dudley Ryder. † Sir John Strange.
‡ Advocate to the Admiralty.
‖ King's Advocate.

Alexander Broadfoot was indicted, August 30, 1743, for the murder of Cornelius Calahan,

of his brother sir John Dinely; and, upon the consultation, some doubts having arisen, which they cannot get over without being informed of the facts herein-after-mentioned, I am commanded by their lordships and Mr. Attorney-General, &c. to write to you thereupon, and to desire your answer with as much dispatch as is possible. The facts they desire to be informed of are as follows: by what authority the city of Bristol claims a right to try this offence; whether it be as the offence was committed within the body of the county of the city of Bristol, or within the port of Bristol; whether the city's right arises by charter or usage; if by charter, when granted; if by usage, in what manner they have exercised that authority. As nothing is intended by this inquiry but the bringing the persons concerned to justice, I must desire that you will be as full in your information as possible, and with all possible dispatch.

I am, sir,

Your most humble servant,

5th *Feb.* 1740. JOHN DOVEY.

The recorder's answer, of which I have a copy in his own hand-writing, was thus:

SIR,

I have the favour of your letter of the fifth. I presume that the doubt which you mention doth not arise upon our general jurisdiction in criminal matters arising within the county of Bristol; but touching our jurisdiction in the place where the fact which captain Goodere is charged with is supposed to have been committed. We do not claim jurisdiction as the place is within the port of Bristol; for we are satisfied that the port extends into the counties of Gloucester and Somerset; but we

claim

a sailor in the king's service, who, without any legal warrant, having boarded the merchant-

claim jurisdiction in the case as the place is within the body of the county of the city of Bristol, which we ground on charter and usage.

King Edward III. by charter tested the 8th of August, in the 47th year of his reign, grants, among other things, to the burgesses of Bristol, that the town of Bristol, with the suburbs and precincts thereof, as well by land as by water, shall be a county of itself, and for ever called the county of Bristol.

A perambulation was taken by juries of the counties of Bristol, Somerset, and Gloucester, by virtue of a commission for that purpose directed to the bishop of Bath and Wells, and others, tested the 1st of September, 47 Edw. III. in which the bounds of the county, as well by land as by water, are very particularly set forth. A copy of it, as far as concerns the bounds of the county by water, you have inclosed. This perambulation is exemplified by letters-patent under the great seal, tested the 30th of October, 47 Edward III. and is confirmed, with the assent of parliament, by charter, tested the 20th of December, in the same year.

There is a note of this parliamentary confirmation in Cotton's Records, p. 119, No. 31; and indeed the words of the charter of the 20th of December are, "We, by the "consent and agreement of the prelates, nobles, great "men, and commons, in the parliament called on the "morrow of St. Edmund the king and martyr last past, "have ratified, approved, and confirmed, &c."

These charters have been, by succeeding kings, from time to time, exemplified and confirmed by charters of inspeximus and confirmation; particularly by one, tested the 22d of April, in the 16th of king Charles II. which is the last inspeximus and exemplification of our charters

we

man to which Broadfoot belonged, in order to press him and other mariners for the publick

we have. King Charles II. by charter, tested the 2d day of June, in the 36th year of his reign, grants, that the city shall remain a county of itself, with as ample bounds, limits, and circuits, as the same city and county, at any time within twenty years then last past, was bounded and limited; and grants and confirms to the mayor, burgesses, and commonalty, all such franchises, &c. as well by land as by water, as to them were heretofore granted by whatever name of incorporation.

Queen Anne, by her charter, tested the 14th of July, in the 9th year of her reign, grants, that the city shall remain a county of itself, with as large and ample boundaries, as well by land as by water, as the said city and county hath at any time, for the space of forty years then past, been bounded; and also grants and confirms to the mayor, burgesses, and commonalty, the same jurisdictions, liberties, powers, and franchises, as at any time heretofore they have used and enjoyed, by reason of any prescription, charters, or letters-patent, of any former kings or queens.

Upon these charters, and a continual usage consonant to them, the city claims jurisdiction in the place where the fact is supposed to be committed, as being within the body of the county of the city; for when the fact was committed, the ship was, as I am informed, at anchor near six leagues within the western limits of the county, as set forth in the perambulation, and about half a league within the northern and eastern limits of it; and all the river south of the Denny is undoubtedly within the county; and indeed no ship can, as I am informed by a very skilful mariner, an officer of the port, lie in Kingroad, unless it lies near a mile within our eastern and northern limits.

In

service, was killed by him in the attempt. On this occasion, the recorder was under the neces-

In fact, Kingroad hath been always esteemed part of the county of Bristol. The city water-bailiff, and other officers, have always executed process of all kinds there; and all offences committed there have been tried and determined, either at our quarter-sessions or gaol-delivery, as the nature of the case required. It is in the memory of many persons, that more than forty years ago a murder was committed on board a merchant-man lying in Kingroad. The murderer was convicted of the fact at the gaol-delivery of the city and county, and was executed. About thirty-five years ago, a person was killed in Kingroad, endeavouring to make his escape from a man of war then lying there. The persons who did the fact were convicted of murder at our gaol-delivery; but, for what reason I have not heard, they were pardoned.

I have been as particular in relation to the information which you desire, as I could be at a short warning: and was not willing to defer one post answering your letter, because you desire dispatch. If their lordships desire farther light in the matter, I shall be ready to give them all I can.

I am, &c.

Feb. 8, 1740. M. F.

The recorder on the next day wrote the following letter to the attorney-general, of which he preserved a copy in his own hand-writing.

SIR,

Saturday last I received a letter from Mr. Dovey, written, as he tells me, by order of the lords of the admiralty, and by your direction, in relation to captain Goodere's affair. I answered his by the return of the post.

I now

sity of inquiring whether the practice of pressing mariners be justifiable in point of law; and

I now beg leave, in behalf of the city, to submit to you, whether, in case you shall be satisfied from what I have written to Mr. Dovey, that we have jurisdiction in the case, you will think it adviseable, that matters should, in this single instance, be taken out of their ordinary course; even supposing the admiralty to have a concurrent jurisdiction with us.

If lord Coke's reading of 15 Richard II. [*Ponts* instead of *Bridges*] is to be justified, the admiralty can have no sort of jurisdiction. But, admitting the common reading [Bridges] to be right, I submit it to you, whether, our jurisdiction being grounded on charter and act of parliament of the 47th of Edward III. the admiralty-jurisdiction is not excluded by the saving clause in 15 Rich. II. in favour of the franchises of cities and towns; and whether, as the coroners of the county have taken an inquisition, which, I apprehend, must be returned to our gaol-delivery, we are not so far possessed of the cause, as that no court, having barely a concurrent jurisdiction, and that too grounded on a statute which expressly saves the franchises of cities and towns, can take it out of our hands. These matters I just hint at, and submit to you; but I beg leave to mention some considerations of another nature, which, I confess, make me a little solicitous about the event of this affair.

The prosecutor and witnesses are already bound by recognizance to prosecute and give evidence at our gaol-delivery. The expence of the prosecution will be greatly increased; and witnesses will not be easily brought to appear at any expence, if the trial is to be in London, or any other place except Bristol. The captain, in a proceeding grounded on the statute 28 Henry VIII. cannot, as I apprehend, be charged as an accessary before

or

the result of his inquiry was a clear conviction, "That the right of impressing mariners for the

or after the fact; and possibly a charge of that kind is capable of a fuller proof than a charge against him as a principal: and a conviction on such proceeding will not, as I take it, be attended with corruption of blood.

The power of the magistrates of the city will be greatly lessened in the esteem of the people under their charge, if the matter be taken out of their hands; and the esteem of the people is, you know, in great measure, the support of all government. The people will never enter into the doctrine of concurrent jurisdictions; but, if they see the admiralty interposing, and assuming the cognizance of this single affair, they will at once conclude, that the magistrates have really no jurisdiction where they are every day exercising one: and the magistrates themselves, whose extraordinary vigilance and zeal in detecting offenders, and bringing them to justice, merit all possible encouragement, will be greatly discouraged in the discharge of that part of their duty in the like cases. I speak these things from experience, and from the observation which I have made on the temper and sentiments of our magistrates and people, since a rumour is got about, that the lords of the admiralty are taking this affair into their own hands.

I should beg pardon for the great freedom which I have taken; but your own zeal for supporting the credit of the magistracy in every part of the kingdom, and for keeping things in due temper, will, I hope, plead my excuse. I am, &c.

Feb. 9, 1740. M. F.

The attorney-general's answer follows.

SIR, *Feb.* 12, 1740, *Chancery-lane.*

I had the favour of your letter by the last post. The occasion of the trouble which you had concerning the jurisdiction

" publick service is a prerogative inherent in " the crown, grounded upon common-law, and

jurisdiction of Bristol was the papers relating to sir John's murder having been first transmitted to the admiralty. The fact being committed in Kingroad made them think of an admiralty-jurisdiction, and take the advice of the king's advocate, sir Edmund Isham, and the advocate belonging to the admiralty. They were both at first of opinion, that the captain ought to be tried at an admiralty-session, by virtue of the statute of Henry VIII. But, for fear of a mistake, Mr. Solicitor-General and myself were consulted. In order to learn whether Kingroad is within the body of any county, and what, before we gave our opinion, we desired to know its situation, and the extent of the county of the city of Bristol, and its jurisdiction. Your answer hath given to Mr. Solicitor-General and myself full satisfaction in that matter; and I believe that you need to be in no pain about the jurisdiction of the city, which the lords of the admiralty had no thoughts of injuring, and meant only to take the utmost care, that so great a criminal should not escape by any mistake of the court where he should be tried. I have not heard that the captain is come to town*; nor have we had an opportunity, since your letter, of a consultation with the civilians. I yet see no reason to doubt of your jurisdiction in the present case; but I cannot give to you a final answer till we have met them again.

I am, sir,
with great respect,
your most obedient servant,
D. Ryder.

On another consultation, the counsel were satisfied that the prisoners ought to be tried at Bristol; and Mr.

* The captain obtained a writ of *habeas corpus*, but never made use of it.

Dovey

"recognized by many acts of Parliament;" but as Calahan had no authority to impress, he thought Broadfoot not guilty of murder, and directed the jury to find him guilty only of manslaughter. The question touching the legality of pressing mariners for the publick service is a point of the greatest importance; and wise and good men still entertain different sen-

Dovey was directed so to inform the recorder, who received from him the following letter:

SIR,

I am ordered by my lords commissioners of the admiralty to acquaint you, that Mr. Attorney-General, and the other counsel, are fully satisfied that the place where his majesty's ship the Ruby lay, at the time of the murder of sir John Dinely, was within the body of the county of the city of Bristol; and that therefore the persons concerned in the said murder must be tried there. I hope that you will excuse my being so short; but I received my orders very late, and thought it my duty to acquaint you as soon as possible.

I am, sir,

Feb. 17, 1740. your most humble servant,

JOHN DOVEY.

N. B. In the recorder's speech to the prisoners on passing sentence upon them, there is a gross misprint: "If drunkenness could be admitted as an excuse for "crimes of this nature, this would be no world *then* of "virtue and sobriety." For *then* read *for men.* The recorder hath made this correction in the printed copy which belonged to him.

timents

timents on the subject. The point, however, which the recorder undertook to maintain, it ought to be remembered, was solely this: *That mariners, persons who have freely chosen a sea-faring life, and whose education and employment have fitted them for the service, and inured them to it, may be legally pressed into the service of the crown, whenever the publick safety requires it, no other effectual method being yet found out for manning our navy in time of war, for raising that number of mariners which the legislature from time to time declares to be necessary for defending our coast and protecting our trade:* and it must at least be admitted, that he hath produced very strong evidence in support of the opinion adopted by him.

In 1735 he published[f] a famous pamphlet, intituled, *An examination of the scheme of Church-power laid down in the* Codex juris ecclesiastici Anglicani, &c. This book engaged the publick attention very much, and in a short time went through several editions. The dangerous tendency of Bishop Gibson's scheme will be apparent from the conclusion of the examination. "The bulk of my readers

* He had, in 1720, published, *A letter of advice to protestant dissenters.* This is an excellent pamphlet, and discovers the most liberal and enlarged views.

"will

" will at least pardon the trouble I have been
" giving them, when they reflect, that the
" leading principles of the Codex, and which
" serve as a foundation to his lordship's scheme
" of church-power, are no other than these:
" That the office of consecration, so often con-
" firmed by parliament, warrants every bishop
" to claim authority by the word of God, for
" the exercise of all manner of spiritual disci-
" pline within his diocese: That the correc-
" tion of vice, and of other defects and irregu-
" larities of a spiritual nature, is the proper
" province of the clergy; and that temporal
" penalties in such cases are then, and then
" only, rendered truly beneficial to religion,
" when they are provided as a farther terror
" and punishment to be called in, as oft as the
" censures of the church are disobeyed: That
" it were to be wished, that the church might,
" in the exercise of her discipline, be at liberty
" to proceed by the wholesome method of ca-
" nonical purgation, and that the ecclesiastical
" courts might not be pestered with prohibi-
" tions from the courts of common-law, nor
" have her proceedings stayed, or her censures
" rendered ineffectual, by pardons from the
" crown, or by acts of grace: That as in all
" ecclesiastical causes the clergy ought to be
" the sole ultimate judges on appeals; so the
" whole prudential administration, under the
" king,

" king, of all affairs which concern spiritual " persons and spiritual things, ought to be " lodged in them: That, with regard to mak- " ing laws concerning religion, or the interest " of the church, the clergy themselves may be " presumed the best judges what assistance of " that kind the church stands in need of, and " what are the methods for promoting reli- " gion, and the interest of the church, in all " kinds: That to this end we have a legislature " consisting of persons spiritual, namely, the " Convocation: and that therefore all sugges- " tions for the improvement of our ecclesiasti- " cal constitution, and for the amendment of " the laws in being of all kinds, as far as con- " cerns the church, her powers, or privileges, " are to be reserved till those matters shall be " made the subject of synodical inquiries and " debates."

The author of the Examination then adds; " These principles, admitted in their utmost " latitude, and in their necessary consequences, " would, I fear, soon introduce that wretched " state of things, which father Paul thought " he saw coming on, when the wholesome dis- " cipline of canonical purgation, and the oath " *ex officio*, were esteemed parts of our ecclesi- " astical constitution. *Anglis ego timeo*, says " that honest churchman; *Episcoporum magna* " *illa potestas, licet sub rege, prorsus mihi* " *suspecta*

" *suspecta est. Ego equum ephippiatum in*
" *Anglia videre videor; et ascensurum pro-*
" *pedièm equitem antiquum divino. Verum*
" *omnia divinæ providentiæ subsunt.*"

Several answers were made to the Examination; but the principal answer was by the author of the Parallel, Dr. Andrews, a civilian, which was published in the same year. Considerable preparations for a reply were immediately made by the author of the Examination; which, however, he never reduced into form. He contented himself with adding to the third edition of his book the following postscript. " The publick hath been lately entertained with " a very angry answer to this pamphlet. If " the author had favoured me with it at the " time the newspapers gave me reason to ex- " pect it, a reply might have accompanied this " edition. But he may be assured, that pro- " per notice will, in due time, be taken of all " the facts and reasonings he presumes upon. " As for the personal severity with which I am " treated by him, it is not in my nature to make " any return of that kind. I forgive him with " all my heart. If, upon cool reflection, he " can forgive himself, I pity him."

On the 10th day of November 1738, the prince and princess of Wales, the father and mother of his present majesty, visited the city of Bristol; and the recorder made a speech to their

their royal highnesses at their entrance into the city, which was much and deservedly admired. I will insert it here, together with the prince's answer.

" May it please your royal highness!

" The mayor, aldermen, common-council, " and citizens of Bristol, beg leave most hum- " bly to acknowledge the great condescension " of your royal highness and her royal highness " the princess, in vouchsafing to honour this " city with your presence; and permitting us to " pay our humble duty to your royal highnesses, " on an occasion of so much joy; an honour we " should be utterly unworthy of, did we not " receive it with hearts full of the warmest im- " pressions of duty and gratitude, and ambi- " tious of recommending ourselves to the ap- " probation of your royal highness, by a most " dutiful and affectionate zeal for the honour " of his majesty's government, and the stability " of his royal house.

" Permit us, therefore, sir, most humbly to " assure your royal highness, that, as we enjoy " the blessings of a free government and ex- " tensive commerce, through his majesty's wis- " dom, equity, and royal goodness; so, while " we contemplate the same principles of true " greatness adorning the character of your " royal highness, we rejoice in the prospect " which lies before us.

" All that we have farther to hope or wish " for is, that when his majesty and your royal " highness shall be removed from the view and " admiration of mankind, and posterity shall " mention your royal names together with ve- " neration, love, and gratitude, a line of princes " descended from your royal highness, and her " royal highness the princess, may be, to latest " ages, the glory and ornament of their times, " guardians of the British constitution, and " advocates for the rights of mankind.

" These, sir, are the sentiments and un- " feigned wishes of his majesty's loyal subjects " the citizens of Bristol, who beg your royal " highness's permission to presume yet farther " on your goodness; and most humbly entreat " your gracious acceptance of the freedom of " this city; which Mr. Mayor has the honour " to present to your royal highness, in the name " of all the freemen of Bristol."

His royal highness's answer:

" Gentlemen,

" I return you my thanks and the princess's " for this instance of your regard; which is the " more pleasing to me, because it is at the same " time a proof of your duty and affection to the " king.

" This great city may always depend upon " my particular wishes for its prosperity, and " the

" the advancement of its trade; which is so " valuable an effect of liberty, and so strong " a support to the honour and happiness of this " nation.

" I shall inculcate these sentiments into my " children; who, I hope, will one day deserve " the concern you express for them now."

In November 1742, when many parts of the nation discovered an unwillingness to raise the necessary supplies for carrying on the war against Spain, in which we were engaged, the recorder was employed in drawing up a letter from the city of Bristol to Mr. Southwell, their surviving representative in parliament. At a meeting of the common council, holden on Monday the 22d day of November, 1742, sir Abraham Elton, bart. mayor, moved, That the thanks of the house should be given to Mr. Southwell, surviving representative in parliament for the city, for his good services in parliament; and that he should be desired to use his utmost endeavours to assist and forward the passing any bill or bills which should be brought into the house of commons, for granting the necessary supplies for carrying on the war wherein his majesty was most justly engaged, by the advice of his parliament, and general voice of his people, in order to defend the rights and liberties of Great Britain: and

the question being put, it passed in the affirmative, *nemine contradicente*, and the following gentlemen, viz.

Michael Foster, serjeant at law, recorder,
John Rich,
Jacob Elton,
Lionel Lyde, and
William Jefferis, } esqrs. aldermen,

were appointed a committee to draw up a letter to the purposes aforesaid, who withdrew and prepared the same, which being read was agreed to, and is as follows.

" To the right hon. EDWARD SOUTHWELL,
" esq. surviving representative in parliament
" for the city of Bristol.

" In the present difficult conjuncture, when " the honour of the crown, the interest of the " kingdom, and the tranquillity of Europe, " demand the attention of the legislature, " we, the mayor, recorder, aldermen, sheriffs, " and common-council-men, of the city of " Bristol, in common-council assembled, take " the liberty of addressing ourselves to you, " who have the honour to represent this city " in parliament; and we flatter ourselves you " will not be displeased, that we use a freedom " on this occasion not unbecoming persons " sensible of the importance of the present " crisis, and concerned for the welfare of their " country.

" It

" It hath been, for more than an age past, " the ruling ambition of a neighbouring state, " to render all the other potentates of Europe " mere creatures of her power, and ministers of " her will. Upon this system all her politics " are turned: to this point have all her coun- " cils been directed: with this view she hath " been lately kindling the flame of a general " war in Europe: and, to facilitate this general " scheme of universal monarchy, she hath ac- " tually invaded a natural and ancient ally of " this kingdom, in open violation of the most " solemn engagements. And though with the " utmost duty and gratitude we acknowledge " the wisdom, equity, and magnanimity, of his " majesty's councils, and rejoice in the great " and glorious effects of them, yet we cannot " reflect on the dangers which but lately en- " gaged the attention and awakened the fears " of good men of every party in the kingdom, " without a very sensible concern for the future " event of things: for it will still depend on the " conduct of Great Britain, and on the part his " majesty may farther be enabled to take in the " present uncertain state of things, whether " the balance of Europe shall be yet main- " tained; in other words, whether Great Bri- " tained shall, for the future, be a free or a de- " pendent nation.

" Your known attachment to the interest of

" your

" your country, unbiassed by personal views, and
" unmoved by popular clamour, leaves us no
" room to doubt, that, at this critical juncture,
" you will steadily and uniformly pursue such
" measures as conduce to the stability of his
" majesty's government, the protection and
" advancement of our trade, and to the safety,
" honour, and lasting interest, of the kingdom;
" particularly, that you will chearfully concur
" in granting to his majesty early and effectual
" supplies for the service of the ensuing year.
" This is a service the present state of publick
" affairs, and the high trust you bear, require
" from you; and did we not presume, that
" your own sense of the importance of the ser-
" vice renders all other motives unnecessary,
" we would, in the most earnest manner, re-
" commend it to you: for without the necessary
" supplies Great Britain must be wholly inac-
" tive at a season when the utmost prudence,
" vigour, and resolution, are necessary to avert
" the dangers which threaten her and her allies;
" the war with Spain, a war undertaken by his
" majesty in defence of our most valuable
" rights, and with the concurrent voice of the
" whole kingdom, must end to the eternal re-
" proach of this nation; without satisfaction
" for past injuries, or security against future
" insults: and the liberties of Europe will, we
" fear, become an easy prey to the boundless

" ambition

" ambition of a formidable power, ever jealous
" of the prosperity of Great Britain, and equal-
" ly a foe to our civil and religious rights. In
" this view of things we cannot fear, that the
" necessary supplies will be denied, or even that
" they will be postponed to considerations of
" a more domestic concern.

" We are not ignorant that this measure hath
" been recommended by some of our fellow-
" subjects with an uncommon, we wish we
" could not say, an indecent and unseasonable
" zeal. For our own parts we declare, that as
" we esteem the freedom and constitutional
" independency of the commons in parliament
" among the most valuable of our legal rights,
" if not the foundation of all the rest, so we are
" convinced, that every consistent advocate for
" British liberty must pay a just regard likewise
" to the freedom and constitutional independ-
" ency of the other branches of the legislature:
" and since the peremptory demand of new
" laws, as preliminary to the granting of the
" necessary supplies, in a time of actual war,
" hath, in our opinion, a fatal tendency, either
" to destroy that freedom and independency, or
" to leave the nation defenceless, we assure
" ourselves you will not give into a measure so
" repugnant to our constitution, and, in its con-
" sequences, so destructive to our country.

" We cannot, we ought not, to conclude this
" address,

" address, without making our public acknow-
" ledgments to you for your unwearied attend-
" ance on the duties of your trust, and the con-
" stant attention you have given to every point
" in which the trade of the kingdom, or the
" interest of this city, have been concerned."

Mr. Southwell's letter to the recorder on this occasion is so candid and sensible, that it well deserves to be placed here.

" Sir, *London, Dec.* 11, 1742.

" The favourable light in which you have
" so advantageously represented my character
" to the publick deserved much earlier acknow-
" ledgments; but I deferred them till the sub-
" ject of your address had undergone the de-
" bates of the house, and till I could deter-
" mine how far it seemed my duty to support
" the present measures for carrying on the war.
" In this great point I thought the real interest
" of his majesty and my country the safest rule
" and measure of my zeal for the queen of Hun-
" gary and the balance of power in Europe;
" and therefore I freely voted for the continuance
" of the same number of British forces by land
" and sea, abroad and at home, which the par-
" liament had consented to last year; and did
" not think it adviseable to disband a single
" man now, which we had given our allies
" assurances of last session. But as I always
" thought,

" thought, that the security of the crown and
" constitution must be founded on the affections
" and confidence of the subject, and that no
" temporary expedient can be admitted for our
" interests or allies abroad, which must raise
" jealousies at home, and in its consequences
" be prejudicial to the liberties of Great Bri-
" tain, I thought it my duty, as a subject, as a
" servant of the crown, as a representative of
" the people, and as a friend to the real inter-
" est of my king and country, to oppose the
" motion for taking 16,000 Hanoverians into
" British pay.

" It is a real concern to me, that so unhappy
" a question should ever be brought into par-
" liament; a point which former ministers had
" cautiously avoided, and which a new one
" could scarcely be expected to attempt: an
" enterprize done without the previous consent
" of parliament, and during the recess, when we
" were convinced, that the Dutch would not
" join in concert with us; without whom, it is
" evident, we can do nothing effectual to the
" settlement of the whole balance of Europe;
" and the whole burthen and expence of this
" vast war must lie singly upon ourselves, as
" the princes of Germany will engage in none
" but a neutral treaty, and we can gain no ally
" without subsidies and pay of troops.

" Here then it was that I thought it proper

" to

" to make a stand, not to deprive our ministers " of the great supplies with which the parliament first enabled them to act, and to retrieve the foreign affairs, but to oppose their " assuming new powers in a new manner, and " in a case wherein the interests of the kingdom and of the electorate must unavoidably " clash, and which ought ever to be as much " avoided as disputes about prerogative and liberty.

" If you think that I ought to have gone " farther, I am sure you judge so on as honest " a principle as induced me to stand my ground " where I did.

" I cannot but add, that your address hath " been received with great applause, and been " printed and reprinted, not only in the newspapers, but separately by itself. The language, the style, and the arguments, have " given the author the just reputation he deserves; and I have had particular satisfaction in finding him so highly commended, " and in confirming the same; for I am, with " great truth,

" Sir,

" your obliged and faithful

" humble servant,

" Edward Southwell."

" The motion was carried by 260 against " 193."

Having

Having greatly distinguished himself on many occasions after his settlement at Bristol, Mr. serjeant Foster, in the vacation after Hilary term 18 Geo. II., on the recommendation of lord chancellor Hardwicke, was appointed to succeed sir William Chapple, as one of the judges of the court of King's Bench. His lordship's letter to him, signifying his majesty's pleasure, is in the following form; and it is as honourable to the writer as to the person to whom it is addressed.

"SIR, *Powis-house, April* 9, 1745.

"In my last letter I acquainted you, that I "believed I should soon give you the trouble "of another London journey. The only mat- "ter which then remained undecided, relating "to your affair, is now over; and yesterday I "received his majesty's commands to signify "his pleasure to you, that you should succeed "Mr. justice Chapple in the court of King's "Bench. It is with great pleasure that I obey "his majesty's commands on this occasion, and "heartily congratulate you on this mark of his "royal favour. In the recommendation which "has been made to the king on this occasion, "I am firmly persuaded that I have done good "service to him and his people, and that your "labours for the interests of both (which in- "deed are but one) will answer all our just "expectations.

"The

" The house of lords will adjourn on Thurs-
" day next to the Thursday following; and,
" during the intermediate days, I propose to
" take a little recess in the country, so that if
" you come to town about the time the house
" sits again, it will be soon enough.

" I beg you will make my best compliments
" to Mr. Mayor and his brethren, who, I hope,
" will believe, that I have not forgot the regard
" I owe to the corporation of Bristol in this
" instance.

" I am, with great truth and esteem,
" sir,
" your most obedient,
" humble servant,
" HARDWICKE."

" The king has been pleased to appoint Mr.
" Clive a baron of the exchequer."

The new judge, having been knighted by the king, was sworn into the office April 22, 1745; and he took his seat in the court on the first day of the next month, being the first day of Easter term[f]. The judges whom he found in the court were sir William Lee, sir Martin Wright, and sir Thomas Denison, men of great abilities and great integrity. These four judges composed the court about nine years. The connexion was broken by the death of chief-justice

[f] See 1 Burrow 1.

Lee,

Lee, which happened in Hilary vacation 1754, 27 Geo. II[g]. He was succeeded by sir Dudley Ryder, who died about two years afterwards[g]. On his death, Mr. Murray, the attorney-general, created lord Mansfield, succeeded to the chief-justiceship, and held the office many years: but, before the death of sir Dudley Ryder, in Hilary term 28 Geo. II. 1755, sir Martin Wright resigned his office; and in the same term, he was succeeded by sir John Eardley Wilmot. These were the only changes in the judges of the court while sir Michael Foster continued in it, from April 22, 1745, to November 7, 1763. In this period many points of singular importance, as well in civil as criminal cases, in which he bore a considerable share, were determined. The criminal cases are reported by himself in his Crown-Law[h]; and many of the others may be seen in the Reports of Strange, Wilson, Burrow, and Blackstone. Although sir Michael Foster generally con-

g See table of the names of the judges, &c. prefixed to 1 Wilson.

h See also the proceedings on the special commission for Sussex in 1748-9 in State Trials, ix. 716, &c. Editions 1766 and 1777; and the trial of William Turton, esq. for the murder of John Holloway, at the assizes holden at Oxford July 17, 1755, before sir Michael Foster, printed in 1755. Mr. Turton was acquitted of the charge, the deceased having been killed by him in his own defence.

curred

curred in opinion with the other judges, yet it must be observed, that on several important questions he differed from some, if not from all, of the judges. A remarkable instance of this sort occurred in the case of John Midwinter and Richard Sims, who were tried before him at the Lent assizes for the county of Gloucester in 1749, for unlawfully, maliciously, and feloniously killing a mare. Midwinter was found guilty, and received sentence of death; but the judge having doubts as to the case of Sims, the jury by his direction found a special verdict with regard to him. The question in that case was[i], whether Sims, who was present aiding and abetting Midwinter in killing a mare of the prosecutor, was ousted of the benefit of clergy by the statute 9 Geo. I. cap. 22, by which it is enacted, "That if any person or "persons shall unlawfully and maliciously kill, "maim, or wound, any cattle, every person so "offending, being thereof lawfully convicted, "shall be adjudged guilty of felony, and shall "suffer death, as in cases of felony, without "benefit of clergy." Mr. justice Foster thought that Sims was a felon, and a principal felon, but that, as aiders and abettors are not named nor described in the statute, and the law re-

[i] I here use the same words which I have used in the Preface to the third edition of the Crown-Law in 1792.

quires

quires statutes so penal to be construed *literally* and *strictly*, he was not excluded from the benefit of clergy. The other judges thought him to be excluded; and some later judges have agreed with them: but the argument of Mr. justice Foster, whom sir William Blackstone[k] justly styles a very great master of the crown-law, and who, as lord chief-justice De Grey[l] upon an important occasion said, may be truly called the *Magna Charta* of liberty of persons as well as fortunes, amounts, in my opinion, to a demonstration, that all those learned judges have mistaken the law. Sims might deserve as severe a punishment as Midwinter; but no punishment which is not authorised by law ought to be inflicted on any man; and the point is, whether the law in this case hath provided the same punishment for both. Mr. justice Blackstone[m], it is material here to observe, adopts the distinctions which Mr. justice Foster endeavours to establish; and he lays down these rules: "That when the benefit of clergy is taken away from the *offence*, "(as in the case of murder, buggery, robbery, "rape, and burglary,) a principal in the second "degree, aiding and abetting the crime, is as "well excluded from his clergy as he that is

[k] See Comment. IV. chap. 1. p. 2.

[l] See 3 Wils. 203.

[m] Comment. IV. chap. 28. § 3.

"principal

" principal in the first degree: but that where " it is only taken away from *the person com-* " *mitting* the offence, (as in the case of stab- " bing, or committing larceny in a dwelling- " house, or privately from the person,) his " aiders and abettors are not excluded; " THROUGH THE TENDERNESS OF THE LAW, " WHICH HATH DETERMINED, THAT SUCH " STATUTES SHALL BE TAKEN LITERALLY. " 1 Hale, P. C. 529; Foster, 356."

In the appendix to the third edition of the Crown-Law, in 1792, I inserted this case; which the author had most reluctantly omitted in the first edition, at the pressing solicitation of lord Mansfield, who, in February 1762, wrote to him the following letter.

" My dear sir,

" I return your papers, which I have read " with great pleasure and approbation; but I " very much wish, that you would not enter " your protest with posterity against the unani- " mous opinion of the other judges in the case " of Sims. If the determination was contrary " to former authorities, there is no hurt in it. " Sims was in every view equally guilty, and " in the very same degree. In real truth, and " not by fiction of law, they both did the act. " Midwinter might not have been able to maim, " had not Sims holden, &c. The authorities " which you cite prove strongly to the contra-

" ry;

" ry: but they seem to be founded in subtle " nicety and very literal interpretation; not " upon the large principles which you lay down, " the doing justice to the publick, and adapt- " ing the punishment to the degree of guilt. " It is impossible to say that Sims was not " equally criminal; and, if his punishment was " less, it could only arise from a slip in pen- " ning the act. The construction is agreeable " to justice: and therefore, suppose it wrong " upon artificial reasonings of law, I think it " better to leave the matter where it is. It is " not *dignus vindice nodus.*

" I am, with great truth,

" Your most affectionate, &c.

" MANSFIELD."

If this case had been published, agreeably to the author's determination, in 1762, it is probable, that the lives of three unfortunate men would have been spared. Seven men[n] were indicted on the statute 9 Geo. I. c. 22, being the same statute on which Midwinter and Sims were indicted, for shooting at John Green in his dwelling-house, and were tried at the Old Bailey in 1768. Three of them were proved to have been present when the others fired, but they had not been seen to use any fire-arms

[n] See the case of the coal-heavers in Leach's Cases, in Crown-Law, p. 61—63.

themselves. The jury found them all guilty; and the judges[o], on a reference to them, determined, that the offence of all was capital; and they were all executed. The words of the statute are, "If any person or persons shall "wilfully and maliciously shoot at any person "in any dwelling-house, or other place, every "person so offending, being thereof lawfully "convicted, shall be adjudged guilty of felony, "and shall suffer death, as in cases of felony, "without benefit of clergy." This case is exactly similar to the case of Midwinter and Sims; and if Mr. justice Foster's opinion in that case be well founded, namely, that the benefit of clergy is taken away only from persons *actually* committing the offence, it follows necessarily, that three of those men suffered a more severe punishment than the law authorizeth. Sims, as I have already said, might deserve as severe a punishment as Midwinter; but if by law the benefit of clergy be taken from the latter, and not from the former, the same punishment ought not to be inflicted on both. In such cases nothing ought to be left to the discretion of judges; it is their province *jus dicere*, not *jus dare*. "THE DISCRETION OF A JUDGE IS," as

[o] Sir Michael Foster and sir William Blackstone were not judges at this time. The former died November 7, 1763; and the latter was made a judge in 1770.

a great

a great man hath said, "THE LAW OF TYRANTS; "IT IS ALWAYS UNKNOWN; IT IS DIFFERENT "IN DIFFERENT MEN; IT IS CASUAL, AND DE- "PENDS UPON CONSTITUTION, TEMPER, AND "PASSION. IN THE BEST, IT IS OFTENTIMES "CAPRICE; IN THE WORST, IT IS EVERY VICE, "FOLLY, AND PASSION, TO WHICH HUMAN "NATURE IS LIABLE." See lord Camden's argument in the case of Doe *v.* Kersey, Pasch. 5 Geo. III. 1765, in. C. B. printed in 1766, p. 53. These remarkable words are also cited by Mr. Fearne in his *Essay on the Learning of Contingent Remainders and Executory Devises*, p. 429, 3d edit. 1776.

The mention of this argument of lord Camden suggests to me the propriety of taking some notice of two cases, which were adjudged in the court of King's Bench, while Mr. justice Foster sat in the court. By the statute of frauds and perjuries, 29 Car. II. c. 3, it is enacted, "That "all devises of lands and tenements shall be in "writing, and signed by the testator, or some "other person in his presence, and by his ex- "press direction; and be subscribed in his pre- "sence by three or four credible witnesses." In the case of Anstey *v.* Dowsing, reported in Strange 1253—1255, it was adjudged, Pasch. 19 Geo. II. by the court, (Lee, Wright, Denison, and Foster,) that a will of lands, attested by three witnesses, one of whom was John

Hailes, to whose wife the testator gave an annuity of 20*l.* *per annum* for her life and for her separate use, and also to each of them, Hailes and his wife, a legacy of 10*l.* for mourning, was not attested by three credible witnesses, and was therefore void as to the lands devised. In consequence of this determination the statute 25 Geo. II. c. 6. was made, by which devisees and legatees, and also creditors whose debts are charged on the real estate, are allowed to be admitted as witnesses to the execution of wills, but the devises and legacies to them are made void. Afterwards Mich. 31 Geo. II. in the case of Wyndham *v.* Chetwynd, reported in 1 Bur. 414—431, and 1 Black. R. 95—103, it was adjudged by the court, (Mansfield, Denison, Foster, and Wilmot,) that a will of lands, charging the real estate with the payment of debts and legacies, and attested by Mr. Higden an apothecary, who had a small demand on the testator, and by Messrs. Squire and Baxter attornies, who had been employed by the testator in soliciting a private act of parliament; by which, however, provision was made for payment of the expences attending it; and from whom, on another account, a balance was due to him, was duly attested by three witnesses. In this opinion the whole court concurred; but lord Mansfield, in giving judgment, entered largely into the subject, and, in assigning his own

own reasons, endeavoured to confute the reasons which chief-justice Lee advanced in the case of Anstey and Dowsing, and to weaken, if not to overturn, the judgment of the court in that case. Lord Camden, in his argument, combats the reasoning of lord Mansfield, and decisively shews, that the opinion of the court, in the case of Anstey and Dowsing, is founded in law and good sense. I will here give, from Mr. justice Foster's notes, his reasons for concurring with lord Mansfield and the rest of the court in the case of Wyndham and Chetwynd. They will throw light on an important subject, and will strongly confirm lord Camden's argument.

" In Michaelmas term 1757, lord Mansfield " delivered the opinion of the court, *with his* " *own reasons*[p] *pretty much at large*, that the " will and codicil were well executed and at- " tested within the intent of the statute of

[p] Lord Camden, in p. 14 of his argument, printed in 1766, asserts, that lord Mansfield declared his argument to be his own, and himself to be answerable for its errors; and this assertion is confirmed by 1 Black. R. 103: but it is observable, that no such declaration is stated by sir James Burrow. Mr. justice Foster informed me at the time, that he said to lord Mansfield on the bench, immediately after the delivery of his argument, " Although I " concur in the judgment of the court, yet I cannot con- " cur in the reasons given by your lordship."

" frauds.

" frauds. The court was unanimous in this " opinion: and indeed there was no great diffi- " culty in the case.

" The single objection to the competency of " the subscribing witnesses is, that they are " creditors by simple contract; and the testator " having subjected his real estate to the pay- " ment of *all* his debts, the witnesses have, " under the will, another fund to resort to, the " real as well as the personal assets. Their " security is mended by the will.

" This objection admits of several answers.

1. " It doth not appear to me, that since the " commencement of the statute of frauds the " objection was ever made; and yet numberless " wills must have been liable to the same ob- " jection. Servants in the family, surgeons, " apothecaries, nurses, and other persons of the " like occupation, attending on sick-beds, at- " tornies and others intrusted with the care of " the testator's concerns,—these are the people " most likely to be called in upon such occa- " sions, and these are the persons who most " probably have been creditors in small sums " at least, and yet the present objection never " thought of, or, if made, never regarded.

2. " It is an objection which ought never to " have received any manner of countenance; " for it tends to defeat the intent of the testator " in the very best thing he can do, and what

" every

" every testator ought to do, the making of an " honest provision for the payment of his just " debts. A provision of this kind is not the " suggestion of fraud and circumvention; and " these alone are the objects of the statute.

3. " The objection merits still less counte- " nance at this time, because the late act " (25 Geo. II. c. 6.) hath made all creditors " competent witnesses within the intent of the " statute of frauds, with regard to wills not " within the exceptions of the act, as the will " in question happens to be. The legislature " plainly saw no inconvenience, no danger of " fraud or perjury, in admitting such witnesses, " their credit being left to a court or jury, as " the credit of witnesses in every case must be. " The late act hath indeed likewise qualified " legatees and devisees, but upon quite differ- " ent terms; for, in order to render them cre- " dible witnesses within the statute of frauds, " it hath taken away all their interest under " the will; every bequest in their favour is " declared to be void. They are no longer " legatees or devisees. Not so with regard to " creditors; they are intitled to satisfaction " upon the principles of common justice: the " others are mere volunteers.

4. " But farther, it doth not appear by this " special verdict, that the subscribing witnesses " had any manner of interest at the time of the " attestation.

" attestation. As to Baxter and Squire, they had " opened two accounts with the testator, one for " business done in the ordinary course of prac- " tice, upon which they are found to be debtors " to the estate. The other concerned the passing " of a private act of parliament for the sale of " lands, in which the testator had an interest. " On this account there is a considerable " balance due to them: but it is found, that the " lands to be sold were by the act made liable " to the payment of that debt *in the first place;* " so that the witnesses were intitled to a satis- " faction out of that estate, and consequently " secure without claiming under the will. As " to the apothecary's bill, besides what hath " been already said, it is found, that the testa- " tor died possessed of a personal estate suffi- " cient for the payment of all his debts on bond " and simple contract, with a great overplus, " and that his real estates are sufficient to dis- " charge all the incumbrances affecting them; " and consequently Higden's debt was well " secured without the help of the will. This " will likewise answer all objections to the " competency of Baxter and Squire, if the an- " swers already given are not thought suffi- " cient.

" These are my reasons for concurring in the " judgment.

" When we are upon the construction of a

" modern

" modern act of parliament, and endeavouring
" to find the true legal sense of the terms which
" it useth, I cannot think it extremely material
" to inquire, what restraints the old Roman
" law laid on testators, at what time, and upon
" what principles, and to what degree, the an-
" cient rigour was abated, or what rendered
" the attesting witnesses competent or incom-
" petent, or how far interest was or was not an
" objection to their competency. In our law,
" interest hath, in almost every case which can
" be conceived, been deemed an objection to
" the competency of a witness. A witness
" having a present interest in the matter in
" question, hath not been deemed a credible
" witness in the construction of statutes which
" require *credible* witnesses to any fact.

" It was holden in the case of Anstey and
" Dowsing, and, I think, very rightly, that in
" the question touching the credibility of a wit-
" ness subscribing and attesting a will of lands,
" the time of the execution of the will and of
" the subscription by the witness is to be singly
" regarded. This nobody ever denied in the
" case of a witness credible at the time of sub-
" scription, and becoming infamous or interest-
" ed before the production of the will *in lite.*

" With regard to a witness interested at the
" time of subscription, the late act hath gone a
" great way towards silencing all future dis-
" putes;

" putes; but in the case of a witness infamous " at that time, how far the infamy may be " purged by a pardon or otherwise, may deserve " great consideration whenever the case shall " come in judgment."

Sir William Blackstone, in several editions of his Commentaries, in Book II. chap. 23, asserts, that the reasons of the determination in the former of those cases were in the latter *adjudged* to be insufficient: but in a conversation which I had with him on the subject, I convinced him, that the assertion was not true; and in consequence in the subsequent editions he changed the word *adjudged* into the word *said.*

In the appendix to the third edition of the Crown-Law I have inserted another case, in which there was a variety of opinion among the judges; chief-justice Ryder on one point differing from Mr. justice Foster and the other judges, and he and Mr. justice Foster agreeing on another point against the others. This case was omitted by the advice of lord Hardwicke; and in the margin of the copy intended for the printer, the author hath written this note: " I " am satisfied that the chief-justice upon the " first question, and the other judges upon the " second, were totally mistaken. A great man " formerly of the profession, by whose advice " the case is omitted, told me, that he hath no

" doubt

" doubt upon either of the questions. I be-
" lieve, that his advice proceeded from a regard
" to the judges, or from his fear of estab-
" lishing a bad precedent by the authority of
" great names, though he did not explain
" himself fully upon that head." I also find among Mr. justice Foster's papers the following letter from his lordship.

" Sir, *Grosvenor-square, Feb.* 24, 1761.

" At the same time that I return your manu-
" script herewith, I desire that you will accept
" my best thanks for the favour of perusing it.
" I have read it through with great pleasure
" and information, being, as every thing must
" be which comes from you, full of much learn-
" ing and ability. Having already mentioned
" the difficulties which occur to me about pub-
" lishing the cases in the house of lords, it is
" unnecessary to add any thing farther on that
" subject; but permit me to beg, that you
" would reconsider, whether it may be advis-
" able to send into the world the case of John
" Bell, tried at the Old Bailey in 1753, on the
" statute 9 and 10 W. III. cap. 26. I forbear
" to express my reasons for calling your atten-
" tion once more to this case.

" I am, with great esteem, sir,

" Your most obedient

" humble servant,

" Hardwicke."

Bell's

Bell's case was thus. He was tried at the Old Bailey in 1753 on an indictment for high treason, grounded on the statute 8 and 9 W. III. c. 26. for having in his custody a press for coinage without any lawful authority or sufficient excuse, and was convicted. On a reference to the judges, two questions were made.

First, whether a press for coinage is one of the tools or instruments within that clause of the act on which this indictment is founded?

Second, supposing it to be within the clause, whether the facts stated in the case amount to *a sufficient excuse*, so as to take the defendant out of the penalties of the act?

Upon the first question, chief-justice Ryder was single, and thought, that a press for coinage is not one of the tools or instruments within the clause of the act on which the indictment is founded. This opinion rests on a very slight foundation in point of law; but it was probably occasioned by an excess of caution and tenderness, he having been attorney-general at the time of the trial.

Upon the second question, the majority of the judges thought, that as the press was intended for coining *Louis d'ors* and other foreign pieces, not the current coin of this kingdom, his case was not within the act. But the other two judges were clearly of opinion, that as the press was intended to be used in coining, and

was

was fitted as well for counterfeiting the coin of the kingdom as any other coin, the prisoner's case was within the act. It could be no excuse, they thought, within the sense and meaning of the act, for him to say, 'I intended the press 'for a very wicked purpose, but not for the 'worst it was adapted to; I intended to com- 'mit misprision of treason, but not high trea- 'son:' the words *sufficient excuse* meaning, in this act, as they do in all language, an honest, a fair, a reasonable excuse, an excuse which an honest man may make without blushing.

Lord Hardwicke, in his last-cited letter, which is dated February 24, 1761, observes, that he had mentioned some difficulties which had occurred to him, about publishing the cases in the house of lords. He refers to a letter written by him February 2, 1761; a copy of which I here insert.

"Sir, *Grosvenor-square, Feb.* 2, 1761.

"I return you many thanks for favouring "me with the perusal of the papers, which are "inclosed in a packet accompanying this letter; "for, however I may happen to differ in opi- "nion from some particulars contained in them, "I could not but receive much pleasure from the "pains which you have taken, and from the com- "position. I should make a very ill return for "your obliging communication, if I did not "take the liberty to give you a hint to look

"into

" into the book of orders of the house of lords, " numero 77, where you will find a standing " order made 27° Feb. 1698, upon occasion of " a complaint made to the house concerning " the publication of sir Bartholomew Shower's " Cases in Parliament, which is still in force " and observed.

" I am, with great regard, sir,
" your most obedient
" humble servant,
" HARDWICKE."

His lordship having conceived some doubts on the case of earl Ferrers was very desirous to prevent the publication of it; and with that view he endeavoured, by a degree of intimidation, to prevail on the author to suppress that case, and also the cases of lord Pitsligo, lord John Drummond, and captain John Gordon: but the author was so perfectly satisfied in the case of earl Ferrers, that he could not comply with the importunate request of a man whom he loved and honoured. I am not, and I believe that Mr. justice Foster was not, apprized of lord Hardwicke's objections; but I well remember to have been told by Mr. justice Foster, that in the opinion of his son, Mr. solicitor-general Yorke, they were not well founded. His lordship, however, was so intent on carrying his point, that he renewed his application on the subject in a letter dated March 30, 1762,

1762, which I will here insert, together with the answer to it.

" *Grosvenor-square, March* 30, 1762.

" SIR,

" I am extremely obliged to you for having " communicated to me the specimen which " you have received from the Oxford-press of " those Reports, which you formerly were so " good as to favour me with the perusal of in " manuscript. I am very glad to observe, that " they are so handsomely and correctly printed.

" I formerly acquainted you, in a short let- " ter, with my doubts as to publishing those " proceedings in the house of lords, which make " a part of the book, without their leave; and " as to the standing order of the house, No. 77, " relative to that point, as I suppose that you " have fully considered it, I will not presume " to give you any farther trouble upon it, ex- " cept to say, that I have not changed my way " of thinking upon it.

" I am truly sorry to find, that the state of " your health has not permitted you to go the " circuit, but extremely glad that you had the " caution not to run so great a hazard; for " nobody can more sincerely wish the perfect " re-establishment of your health than,

" Sir, your most obedient,

" and faithful humble servant,

" HARDWICKE."

The

The answer here follows, which I take from a copy preserved by the author in his own hand-writing. The reader will perceive from it, that he thought the method taken by the noble lord for effecting his purpose to be improper and ungenerous.

" My Lord, *April* 2, 1762.

" I have the honour of your lordship's letter " of the 30th of March; and must ever acknow- " ledge your goodness in again putting me in " mind of the standing order, No. 77. But as " that order, though conceived in general terms, " was made upon a special occasion, the publi- " cation of an entire volume, professedly styled " *Cases in Parliament*, I should hope, that the " few cases which I have inserted among other " crown cases, and which fall within my gene- " ral plan, may be entitled to the same indul- " gence which those reported by Peere-Wil- " liams, Strange, Comyns, and many other " writers, have met with. I have presumed, as " they did, upon the benignity of the house; " and if I have written with equal precision " and judgment, I hope that I shall not incur " a censure which they have escaped.

" Hasty and indigested Reports of what pass- " eth in parliament would, I own, reflect some " dishonour on that august judicature. They " do so on every court in Westminster-hall, " and they are become the burden and scandal

" of

" of the profession. Against such reports, it is " probable, the standing order was principally " levelled. But since other writers have, with- " out censure, reported parliament-cases arising " within their own experience, I flatter myself " that I shall not be distinguished from them, " and that I shall not be the first writer against " whom an order of more than 60 years standing " shall be revived. My hopes in this respect " are grounded on the well-known candour and " magnanimity of the house; and, permit me to " add, upon the friendship which your lordship " has long honoured me with, and your great " weight in that assembly. These considera- " tions encourage me to hope, that an old ser- " vant of the publick (not, I trust, wholly an " unprofitable one) has little to fear from the " *sleeping lions.* Your lordship knows whence " I borrow this figure.

" I am, &c. M. F."

I cannot forbear to observe, that in Hilary term, 30 Geo. II. 1757, a difference of opinion appeared in the court of King's Bench on a very constitutional point; I mean in respect to the writ of *habeas corpus.* This affair excited great attention a considerable time, and in consequence of it a bill was brought into the house of commons *for giving a more speedy remedy to the subject upon the writ of habeas corpus;*

but sir James Burrow in his Reports is totally silent in regard to this business.

As we have not, to my knowledge, any good account of this important affair in print, I will give the best account which I can extract from Mr. justice Foster's notes and papers. It appears by his note book, that in that term motions were made to the court for several writs of *habeas corpus* in favour of men impressed for soldiers under the statute 29 Geo. II. c. 4. upon affidavits intended to shew the men not to be within the description of the statute; that the court, instead of granting the writs, made rules for shewing cause why the writs should not go, for notice to be given to the solicitor of the Treasury, and for the keeper of the Savoy, not to suffer them to be removed in the mean time; and that afterwards in the same term the men were discharged by the court with the consent of Mr. solicitor-general Yorke. These cases are severally intitled *the King* against *Hayward;* and in them Mr. justice Foster expressed his sentiments concerning the writ of *habeas corpus*, and in particular declared it to be his opinion, that the return to the writ is not in all cases conclusive to the court or to the parties, but that men, wrongfully impressed into the publick service by sea or land, are by law intitled to, and ought to have, an easier and speedier remedy than an action for a false return,

return, which may afford to them not the least relief. Among his papers I find in his own hand-writing a copy of a letter which he wrote to Mr. solicitor-general Yorke; the date of which he hath neglected to preserve in his copy, but from internal marks it was manifestly written in the former part of the year 1758.

" Sir,

" The practice of granting writs of *habeas* " *corpus* in the vacation in cases not within " the *habeas corpus* act having long prevailed, " I confess that I did not entertain any sort of " doubt touching the legality of it; though " possibly there might have been some room " for a doubt, if the passage in lord Hale " (2 Hale 145), which you mentioned, and " that in 2 Inst. 53, had been considered inde- " pendently of the practice. But as I always " considered the case of a barely wrongful de- " tention as not within the *habeas corpus* act, " but merely at common law, I thought a legal " sound discretion ought to be used, and gene- " rally expected an affidavit, on behalf of the " party applying for the writ, setting forth " some probable ground for relief upon the " merits of his case. This method I constantly " observed in the case of men pressed into the " service: and that the publick service might " not suffer by an abuse of the writ, I ordered " notice to be given to the proper officers of

" the crown, of the time at which the party " was to be brought before me, with copies of " the affidavits. In this way several were dis- " charged: and I must say, that in some in- " stances I saw so much oppression on the part " of those concerned in that service, that I am " satisfied the subject ought to have some better " relief than what the pressing acts have pro- " vided.

" About the latter end of Michaelmas-vaca- " tion-was-twelve-month, applications for the " writ coming very thick upon me, I began to " see the difficulty of steering properly between " the liberty of the subject and the necessities " of the publick; and accordingly desired the " advice and assistance of the other judges of " the court. We met at my chambers a few " days before Hilary term; when I found that " the doubt which I have mentioned had ope- " rated strongly. This determined me, the " term being at hand, to proceed no farther " than the discharging of one or two upon re- " cognizance for their appearance in the term. " What passed in court upon motions for the " writ is well known.

" I sent to you the other day the copy of the " return in the case of the Queen and Cham- " berlain. When you shall have got it tran- " scribed, you will return it to me. I have no " note of that case, nor of any others relating

" to

" to this matter, in the late queen's time, " though I attended Westminster-hall a little " more than five years before her death. There " was no act for pressing in the last reign; and " I think, that all the acts of that kind in the " present have been made since I was on the " bench. From the few notes which I have " relating to that matter I find, that the court " hath not granted the writ as of course, and " within the *habeas corpus* act, but hath re- " quired affidavits on behalf of the party apply- " ing for it, setting forth the merits of his case: " and, on the other hand, though proper re- " turns in point of form may have been made, " the court hath not given entire credit to " them, and put the party complaining to his " remedy by action for a false return; but hath " constantly entered into the merits of the case " upon affidavits, and either discharged or re- " manded the party, as the case hath appeared.

" This was done in Trinity term, in the 19th " or 20th of the king, in the case of one Rey- " nolds[q]; and in Easter term, in the 29th of

[q] After writing this letter the author drew up a fuller account of this case, which I will here give.

" *The* KING *against* WHITE.

" Saturday next after the Octave of the Holy Trinity, " in the 19th year of King Geo. II. a writ to major Tho- " mas White in the Tower of London or his deputy, for " Thomas Reynolds. Major White, by the name of " RICHARD

" the king, in the case of one Hamilton; and " in the following term, in the case of one

" RICHARD *White* (for his christian name was mistaken " in the writ) returns, " That Reynolds was committed to " his custody, as a person impressed according to the act " (18 Geo. II. c. 10.) then lately made for recruiting his " majesty's land forces and marines, which is the cause " of his detention; and he brings his body into court." The return seems to be sufficient in point of form.

" Monday next after Three weeks of the holy Trinity, " in the 19th year of the king, Reynolds being brought " into court in the custody of Richard White, it is order- " ed by consent of counsel on both sides, that the name " *Thomas* White mentioned in the writ be made *Richard* " White: and it is farther ordered, that the said writ and " return be filed, and that the said White bring into " court the said Reynolds on Wednesday next. And " upon reading the several affidavits of Thomas Kell, " &c. &c. it is farther ordered, that Thomas Bedwell, " &c. &c.—*(the commissioners for putting the act in exe-* " *cution, who acted in the affair)*—shew cause to-morrow, " why the said Reynolds should not be discharged out of " the custody of the said Richard White. The affidavits " above-mentioned were in behalf of Reynolds, in order " to shew, that he was not a person within the descrip- " tion of the act, and that the impressing of him was a " wicked scheme of one Robinson, and founded in " malice.

" Wednesday next after Three weeks of the holy " Trinity, in the 19th year of the king, Reynolds being " brought into court by major White, gives his own " recognizance in the sum of 100*l.* for his appearance in " court the first day of next term, to answer to such things " as shall be objected against him; and thereupon it is " ordered, that he be discharged out of the custody of

" major

" Worald,—all pressed men; and of one " M'Nown, a supposed deserter, but in truth " an out-pensioner of Chelsea; and in a few " other cases, of which I find no notes. In " some of these cases the parties, complaining " were discharged in court; in others they en- " tered into recognizances, with the consent of " the counsel for the crown, to appear the next " term, and were then discharged, the king's " counsel either consenting or not opposing.

" major White. On shewing cause, the above-men- " tioned affidavits were read on the part of Reynolds; " and on the part of the commissioners, their own affida- " vit, and the affidavits of Robinson and some others, " were read in support of what the commissioners had " done in the affair; and the court, upon consideration " of the affidavits on either side, made the last rule: " and upon the first day of the next term Reynolds " appeared, and his recognizance was discharged, no " opposition being then made on the part of the crown " or of the commissioners.

" I was favoured by my brother Bathurst with copies " of the rules, writ, and return, and of the affidavits filed " in the office.

" I have an imperfect note of this case. Affidavits " were read on both sides: and the court said, that al- " though it is not usual to enter into the truth of facts " set forth in the return to a *habeas corpus*, yet in this " case, as the party suing the writ hath no other remedy, " it may be done: and that if Reynolds is not within the " description of the act, the commissioners have no sort " of jurisdiction over him: the whole proceeding is a " mere nullity, as *coram non judice*."

" If

" If what I have written will either give " you light into the matters about which you " inquired, when I had the favour of a visit " from you, or afford you any amusement, you " are heartily welcome to it.

" I am, &c. M. F."

" Excuse some rasures and after-thoughts; " for transcribing a long letter, with thick " ink, soft pen, and hard paper, is riding " twice over a deep road upon a lame " horse."

On the 9th of May 1758, the house of lords, on the second reading of the bill from the commons, intituled, *An act for giving a more speedy remedy to the subject upon the writ of habeas corpus*, ordered the judges to attend the house, to deliver their opinions *seriatim*, with their reasons, upon ten questions, which may be seen in the journal of the house of lords of that day. On the 25th, 26th, and 29th days of May, many of the judges delivered their opinions on the questions proposed to them by the lords; and on the 2d of June, after long debate, the bill was rejected by the lords, who then ordered the judges to prepare a bill to extend the power of granting writs of *habeas corpus ad subjiciendum* in vacation-time, in cases not within the statute 31 Car. II. c. 2. to all the judges of his majesty's courts at Westminster, and

and to provide for the issuing of process in vacation-time to compel obedience to such writs; and in preparing such bill to take into consideration, whether in any and what cases it may be proper to make provision, that the truth of the facts contained in the return to a writ of *habeas corpus* may be controverted by affidavits or traverse, and, so far as it should appear to be proper, to insert clauses for that purpose, and to lay such bill before the house in the beginning of the next session of parliament[r].

About this time, May 15, 1758, lady Foster died after a long illness; and by this event Mr. justice Foster was prevented from attending the house. However, on the 24th of that month, he wrote to chief-baron Parker an excellent letter, of which he hath preserved a copy in his own hand-writing.

"My Lord, *May* 24, 1758.

"When we met at lord chief-justice Willes's "house, I had the satisfaction to find, that you "and I do not differ in opinion upon any of the "questions proposed to us by their lordships, "except the tenth. Upon that question, "which your lordship sees is proposed in the "strongest and most striking terms[s], we did "then seem to differ.

[r] See the Lords Journals, XXIX. p. 312. 322. 331. 337—341. 344—347. 349. 352. 353.

[s] That question is in the following words: "Whether "in all cases whatsoever the judges are so bound by the "facts set forth in the return to the writ of *habeas corpus*, "that

" I agree with your lordship in the truth of " the general doctrine, that a return to a writ

" that they cannot discharge the person brought up be- " fore them, although it should appear most manifestly " to the judges, by the clearest and most undoubted " proof, that such return is false in fact, and that the " person so brought up is restrained of his liberty by the " most unwarrantable means, and in direct violation of " law and justice?"

Mr. justice Foster hath written in the margin — " GOD " FORBID THAT THEY SHOULD." But how is this question answered by some of the judges? Chief-baron Parker's answer is thus: " That in no cases whatsoever the judges " are so bound by the facts set forth in the return to the " writ of *habeas corpus*, that they cannot discharge the " person brought up before them, if it should appear " most manifestly to the judges, by the clearest and " most undoubted proof, that such return is false in fact, " and that the person so brought up is restrained of his " liberty by the most unwarrantable means, and in direct " violation of law and justice; *but by the clearest and " most undoubted proof he understands the verdict of a " jury, or judgment on demurrer or otherwise, in an action " for a false return; and in case the facts returned to a " writ of habeas corpus shew a sufficient ground in point of " law for such restraint, he is of opinion, that the court or " judge, before whom such writ is returnable, cannot try " the facts contained in such return by affidavits.*" In nearly the same manner the question is answered by Mr. justice Denison, Mr. baron Smythe, Mr. baron Adams, and Mr. justice Wilmot. If the opinion of these judges be agreeable to law, the greatest injury, as Mr. justice Foster observes, may be done to a man without a possibility of redress. Goldswain's case, which is reported in 2 Blackstone's Reports, 1207—1211, and which came before the court of Common Pleas, (De Grey, Gould, Blackstone, and

" of *habeas corpus* is conclusive in point of fact. " It cannot be traversed[t]; the court is bound

and Nares,) Pasch. and Trin. 18 Geo. III. 1778, now deserves the greatest attention. He was illegally pressed into the sea-service, and Mr. justice Gould said,—" I " do not conceive, that either the court or the party are " concluded by the return of a *habeas corpus*, but he may " plead to it any special matter necessary to regain his " liberty. St. John's case, 5 Rep. 71, was a case of this " kind. One Gardener was convicted and imprisoned " for carrying a hand-gun, and this cause being re- " turned on *habeas corpus*, he pleaded to it, that he " was a sheriff's officer, and as such entitled to " carry a hand-gun; which plea being confessed, he " was discharged. It is said in *the Queen* and *Burnaby*, " Ld. Kym. 900. Salk. 181, that the record of St. John's " case cannot be found; owing perhaps to a mistake of " the year, which is in Coke 34 Eliz. whereas in Cro. " Eliz. 821 it is reported under the name of Gardener's " case in 43 Eliz. and there is a copy of the record in " Tremaine 354, which is said to be P. 43 Eliz. rot. 49." The learned reporter adds,—" The court declared, that " they could not wilfully shut their eyes against such " facts as appeared on the affidavits, but which were not " noticed on the return. They were inclined to think it " their duty immediately to discharge the party; and " should therefore in some measure do it; but still with " a reserve to any question of law, which the admiralty " meant seriously to argue. They therefore discharged " Goldswain on his own recognizance of 20*l.* to appear in " court the second day of the next, being Trinity, term; " and in the mean time recommended it to the counsel " for the admiralty to consider, whether they would " amend their return: in default of which the court

---

[t] See Goldswain's case, cited above, in note [s].

" would

" by it, and the injured party is driven to his
" action. This, I admit, is the general rule;
" but I think that it is not universally true.
" Cases may be put which are exceptions to it;
" and exceptions do not, as your lordship well
" knows, destroy, but rather establish, a gene-
" ral rule. The case of persons pressed into the
" service is, I conceive, one of them, for this plain
" reason, that if the party cannot controvert
" the truth of the facts set forth in the return,
" he is absolutely without remedy. An inade-
" quate ineffectual remedy is no remedy; it is
" a rope thrown out to a drowning man, which
" cannot reach him, or will not bear his weight.
" It is the offering of baubles to the children of
" one's family, when they are crying for bread.
" In common cases, in every case where the
" general rule is laid down, the injured party
" must wait with patience till he can falsify the
" return in a proper action. This, it must be
" confessed, is a great misfortune; but, till the
" day of his deliverance comes, he continues at
" home in the custody of the law, and under its

" would consider whether to quash it for insufficiency,
" or admit Goldswain to plead to it according to the pre-
" cedent cited by Gould, justice; or take it up in a more
" summary way, by taking *pro confesso* the matters stated
" in the original affidavits. And now on the second day
" of this term, being the 20th of June, Goldswain ap-
" peared on his recognizance, and was finally discharged,
" by consent of Davy, counsel for the board of admi-
" ralty."

" protection.

" protection. This, your lordship knows, is " not the case of a man pressed into the service " by land or sea, supposing him to be no object " of the law. He is taken from the Exchange, " or from behind his counter, no matter whence, " and thence to the Savoy, or aboard a tender; " and if his friends happen to have time enough " to procure a *habeas corpus*, a sufficient return " to the writ is immediately made, (there are " precedents enough in the crown-office, and they " are soon copied,) and the man is sent away, in " due form of law, to take his chance, for some " years perhaps, amidst the perils of the sea, " and the disasters of war. But it is said, that " he is not without a remedy. What remedy? " An action against a man perhaps not worth a " groat. But how responsible soever the officer " may be, what satisfaction in damages is equal " to the injury? or, if that were possible to be " had, what becomes of the action, if the plain- " tiff should be knocked on the head in the ser- " vice? Why, truly, *moritur cum personâ.* " In short, he hath, in this view of the case, " no remedy, unless you give him what I call " the specifick remedy, a right to controvert " the truth of the return before it is too late.

" In the case of *the King* and *White*, which " was mentioned at our last meeting, the court " considered the matter in this light, and in the " end the man was discharged upon reading

" affidavits

" affidavits on both sides. The like hath since been " done in other cases of like nature. It matters " not with me, what method the court took to " come at the merits of the question in point of " fact. The principle which they went upon " is what I rely on: and the principle, as I " take it, was, that though in common cases " the return is conclusive in point of fact, yet " these special cases, as they come not within " the general reason of the law, are not within " the general rule. The parties are without " remedy, if they are not to controvert the " truth of the return in a summary way; and " therefore they shall do it.

" You may be surprised to receive so long a " letter from me at this time; but, to confess " a serious truth, while I am thinking of these " indifferent matters, I feel that my mind is " employed upon something which doth not " give me pain.

" I am, &c. M. F."

To this letter the chief-baron, May 27, 1758, returned the following answer:

" Good Brother,

" I am favoured with your letter, and am " very sorry for your late great loss. As you " agree to the general principle, that the return " of a *habeas corpus* cannot be contradicted in " that proceeding, so I must confess, that your " reasons are very strong to shew the present " to be an inadequate remedy; but I am afraid,

" that

" that the parliament only can apply a quicker " and more effectual remedy. As to the case " of *the King* and *White*, and several subse- " quent cases, I entirely approve them, but " consider them as collateral proceedings, " founded on the general power of the court of " King's Bench, to correct the acts or misde- " meanours of all inferior jurisdictions to the " oppression of the subject. We have gone as " far in delivering our opinions as my brother " Smythe, and are to proceed on Tuesday, so " that it must be left to your own discretion, " whether you will give your opinion or not; " but if you should not choose to appear, I " have taken care, that my lord-keeper shall " excuse your absence to the lords.

" I am, with true respect, sir,

" Your most obliged brother,

" And obedient servant,

" T. PARKER.

" *Bedford-row, May* 27, 1758."

While this business was depending in the house of commons, Mr. justice Wilmot wrote to Mr. justice Foster the following letter.

" *Ormond-street, April* 9, 1758.

" DEAR BROTHER,

" I herewith send you a state and some rea- " sons, which lord Mansfield and I have put " together, to explain and support the court's " proceedings upon the present act.

" We

" We desire, that you will be so good, as " soon as possible, to look them over, and to " correct them as you think proper, and to add " such other reasons as occur to you in support " of what we were all of opinion to do; and I " own, that I am still strongly of the same " opinion. If you should think, that, suppos- " ing the construction of the act wrong, yet " what we did was right, that may properly be " added, and is an argument *à fortiori.*

" You recollect, that this happened but just " before Hilary term. The parliament was sit- " ting, and in the new bill might have laid " down what rule they pleased before the vaca- " tion.

" I am, dear brother,
" your most faithful friend,
" and most obliged
" humble servant,
" EARDLEY WILMOT."

Mr. justice Foster the next day returned an answer to Mr. justice Wilmot, which, as I am informed by his son, John Wilmot, esq. one of the masters of the court of Chancery, is not found among his papers. I give it from a copy in my possession in the author's hand-writing.

" DEAR BROTHER, *April* 10, 1758.

" Lord Mansfield did me the favour of a visit " on Saturday, and told me of the paper which " I received

" I received from you yesterday, and now re-
" turn. He told me, that it was intended as a
" justification of the rule which we made in
" Hilary-term-was-twelve-month: but in what
" manner it is to be made use of, I know not.

" It will undoubtedly be a full justification
" of that measure, if it be known, that even a
" majority of the judges have put the con-
" struction on the act which you contend for.
" They, if they are well founded, need no better
" justification; and the judge who differed
" desires no better than to say, that he came
" into the measure, as the only expedient,
" which, all things considered, offered, to let
" the subject into a proper defence against the
" abuse of the powers given by the act.

" I have made some marks with my pencil
" on your paper, which I will now explain.

" P. 1. * The first consideration was, whe-
" ther a writ of *habeas corpus* might issue in
" the vacation in cases not within the *habeas*
" *corpus* act, and the passages in Coke and
" Hale were mentioned: but that matter, upon
" farther inquiry, is now put out of doubt. I
" indeed, out of pure deference to what I took
" to be the opinion of the majority, have de-
" clined granting the writ in the vacation, but
" sorely against my own judgment. I am in-
" formed, that writs have issued in the vacation
" since that time.

" P. 2. *††† p. 3.* p. 8.* In these places, " and perhaps in some others, which I have not " marked, you speak of the judges in general; " you should confine yourself to the major part, " which, I suppose, is the case.

" P. 8.† Here all the judges concurred.

" P. 9.* The words struck out should be " inserted: and you will be pleased to consi- " der, whether this rule, and that which we " grounded upon it, do not go on a supposition, " that the adjudication of the commissioners is " not final to all intents and purposes. With " regard to those who are the real objects of " the law it is final: and with regard to the " persons to whose custody prest men are deli- " vered till they can be otherwise disposed of, " and likewise to the officers who receive them " and treat them as soldiers enlisted, it is a full " indemnity for what they do under the autho- " rity of the commissioners. This construc- " tion the act will bear, and the strong wording " of it, which you have very properly pointed " out, plainly leads to it, and, I think too, is " sufficiently satisfied by it: but that the adju- " dication of the commissioners should be con- " clusive to the parties, whether objects of the " law or not, I can never admit. You argue " from the intention of the act. I know no " better rule of construction than attending to " the intention of the legislature. Be pleased

" to

" to try your leading principle by this rule.
" Was it the intention of the legislature to re-
" peal *magna charta;* to put every man in the
" kingdom into the power of two or three com-
" missioners met over their liquor at an ale-
" house or a tavern; to send the best man
" among us *food for powder* to North America?
" This, I am sure, was not their intention; and
" yet, if the adjudication of the commissioners
" be conclusive to the party, and a proper return
" be made to the writ, this may be the conse-
" quence.

" P. 9.* I do not recollect this circum-
" stance. I did not sufficiently attend to all
" which passed that day.

" I have spoken my mind freely to you. I
" have, you know, spoken to the same effect
" more than once on the bench; and I have
" seen no reason to alter my opinion. I hope
" that I shall have no occasion to say any thing
" more on the subject *in publick:* for at a time
" when the world is full of jealousy, and run-
" ning mad after popularity, one would not
" wish to see judges divided on points, where
" the liberty of the subject is so nearly con-
" cerned.

" I am, &c. M. F."

Whether the paper mentioned in these letters be now in existence or not, I am unable to say. On a view of the facts and reasons here

brought together, it is natural to wish, that the bill, which the judges drew[u] with great care

[u] It is in the following words: "Whereas the writ of "*habeas corpus ad subjiciendum* hath been found by ex- "perience to be the most expeditious and effectual "method of restoring any person to his liberty who hath "been unjustly deprived thereof; and whereas extend- "ing the remedy of such writ, and enforcing obedience "thereunto, and preventing delays in the execution "thereof, and ascertaining the proceedings thereupon, "will be greatly beneficial to the subject: Be it there- "fore enacted by the king's most excellent majesty, by "and with the advice and consent of the lords spiritual "and temporal and commons, in this present parliament "assembled, and by the authority of the same, that where "any person shall be confined or restrained of his or her "liberty, otherwise than for some criminal or supposed "criminal matter, it shall and may be lawful for the lord "chancellor, lord keeper, lords commissioners of the "great seal for the time being, or any one of them, or "any one of his majesty's justices of the one bench or "the other, or the barons of the exchequer of the degree "of the coif, and they are hereby required upon com- "plaint made to them by or on the behalf of the person "so confined or restrained, if it shall appear by affidavit "or affirmation (in cases where by law an affirmation is "allowed) that there is a probable and reasonable ground "for such complaint, to award in vacation-time a writ of "*habeas corpus ad subjiciendum*, under the seal of such "court whereof he shall then be one of the judges, to be "directed to the person or persons in whose custody or "power the party so confined or restrained shall be, "returnable *immediatè* before the person so awarding the "same, or before any other judge of the court under the "seal of which the said writ issued.

"And

and attention by order of the house of lords, had been brought into the house, and passed

" And be it farther enacted by the authority aforesaid, " that if the person or persons to whom any writ of " *habeas corpus* shall be directed in pursuance of this act, " upon service of such writ, either by the actual delivery " thereof to him, her, or them, or by leaving the same at " the place where the party shall be confined or re- " strained with any servant or agent of the person or per- " sons so confining or restraining, shall wilfully neglect " or refuse to make a return or pay obedience thereto, " he or she shall be deemed guilty of a contempt of the " court under the seal whereof such writ shall issue: and " it shall and may be lawful to and for the said lord " chancellor, lord keeper, lord commissioner, justice, or " baron, before whom such writ shall be returnable, upon " proof made of such service, to award in the vacation- " time process of contempt under the seal of such court " against the person or persons guilty of such contempt, " returnable before himself in the vacation-time, who " shall proceed thereon as to law and justice shall ap- " pertain.

" Provided, that if such writ shall be awarded so late in " the vacation by any one of the said justices or barons, " that in his opinion obedience thereto cannot be con- " veniently paid during such vacation, the same shall and " may at his discretion be made returnable in his majes- " ty's court of king's bench at a day certain in the next " term: and the said court shall and may proceed there- " upon, and award process of contempt in case of disobe- " dience thereto, in like manner as if such writ had been " originally awarded by the said court.

" Provided also, that if such writ shall be awarded by " the court of king's bench in term, but so late, that in " the judgment of the said court obedience thereto can-

" not

into a law; for although Mr. justice Blackstone in his invaluable Commentaries on the

" not be conveniently paid during such term, the same " shall and may, at the discretion of the said court, be " made returnable at a day certain in the then next vaca- " tion before any judge of the same court, who shall and " may proceed thereupon, in such manner as by this act " is directed concerning writs issuing in and made re- " turnable during the vacation.

" And be it farther enacted by the authority aforesaid, " that in all cases provided for by this act, although the " return to any writ of *habeas corpus* shall be good and " sufficient in law, the said lord chancellor, lord keeper, " lord commissioner, justice, or baron, before whom such " writ shall be returnable, shall, as soon as conveniently " may be, proceed to examine into the truth of the facts " set forth in such return, and into the cause of such " confinement or restraint, by affidavit, or by affirmation " (in cases where an affirmation is allowed by law), and " shall do therein as to justice shall appertain. And if " such writ shall be returned before any one of the said " justices or barons, and it shall appear doubtful to him " on such examination, whether the material facts set " forth in the said return, or any of them, be true or not, " in such case it shall and may be lawful for such justice " or baron to let to bail the said person so confined or " restrained, upon his or her entering into a recognizance " with one or more sureties, or in case of infancy or co- " verture upon security by recognizance in a reasonable " sum, to appear in the court of king's bench, upon a " day certain in the term following, and so from day to " day as the court shall require, and to abide such order " as the court shall make in and concerning the premises; " and such justice or baron shall transmit into the same " court the said writ and return, together with the said

" recognizance,

laws of England (book iii. c. 8.) asserts, "That "the remedy is now complete for removing the

"recognizance, affidavits, and affirmations; and there- "upon the said court shall proceed, order, and determine, "touching the discharging, bailing, or remanding the "party, as to justice shall appertain, either in a summary "way by affidavit or affirmation, or by directing one or "more issues for the trial of the facts set forth in such "return, or any of them, whereupon such proceedings "shall be had as in other cases of issues directed by that "court.

"And be it farther enacted by the authority aforesaid, "that the like proceeding shall be had in the same court "for controverting the truth of the return to all writs of "*habeas corpus* awarded for or on behalf of any person "confined or restrained of his or her liberty, otherwise "than for some criminal or supposed criminal matter, by "affidavit, affirmation, or otherwise, although such writ "shall be awarded by the said court, or be returnable "therein.

"And be it farther enacted by the authority aforesaid, "that it shall and may be lawful for the court or judge "proceeding on any writ of *habeas corpus ad subjicien-* "*dum* awarded in cases of confinement, not for a crimi- "nal or supposed criminal matter, to make such order "in regard to the payment of the charges and expences "of bringing up the party so confined or restrained, and "for carrying him or her back to his or her place of con- "finement in case of remanding, as to such court or judge "shall upon examination thereof seem meet; and for "non-payment thereof to award process of contempt, "whereupon such proceedings shall be had as in other "cases of contempt for non-payment of costs.

"And be it declared and enacted by the authority "aforesaid, that an *habeas corpus*, according to the true

"intent

" injury of unjust and illegal confinement," yet it is manifest from the observations of Mr. justice Foster, and from the bill drawn by the

" intent and meaning of this act, may be directed and " run into any county palatine, the cinque ports, or any " other privileged places within that part of Great " Britain called England, dominion of Wales, and town " of Berwick-upon-Tweed, and the isles of Jersey, " Guernsey, and Man; and also into any port, harbour, " road, creek, or bay, upon the coast of England or " Wales, although the same should lye out of the body " of any county, any law or usage to the contrary in any " wise notwithstanding.

" Provided always, that nothing in this act contained " shall extend to discharge out of prison any person " charged in debt or other action, or with process in " any civil suit.

" And be it farther enacted by the authority afore- " said, that the several provisions made by this act " touching the making writs of *habeas corpus* issuing in " time of vacation returnable in the court of king's " bench, or for making such writs awarded in term-time " returnable in the vacation, as the cases may respectively " happen; and also for awarding process of contempt in " the time of vacation against the person or persons neg- " lecting or refusing to make return of such writs, or to " pay obedience thereto, shall extend to all writs of " *habeas corpus* awarded in pursuance of a certain act " passed in the thirty-first year of king Charles the " second, intituled, *An act for the better securing the* " *liberty of the subject, and for prevention of imprisonment* " *beyond the seas*, in as ample and beneficial a manner as " if such writs and the said cases arising thereon had " been herein before specially named and provided for."

judges,

judges, that this assertion is not well founded, and that farther relief in some cases is desirable. These letters, and the answers of Mr. justice Denison and Mr. justice Wilmot to the tenth question proposed by the house of lords to the judges, with the other evidence above-adduced, seem to prove, contrary to the assertions in 4 Burrow 2395 and 2582, that on this occasion there was a final difference of opinion in the court of king's bench.

It is remarkable, that only one judgment given by the court of king's bench, while Mr. justice Foster was among the judges there, hath been reversed. The case to which I allude was an insurance cause, *Fitzgerald* against *Pole*, cited several times in the cases of *Goss and another* against *Withers*, and of *Hamilton* against *Mendes*, in 2 Bur. 683—698 and 1198—1215. The plaintiff in his declaration states, that he and another, whom he survived, August 31, 1744, caused to be made a certain policy of assurance purporting thereby and containing therein, that they made assurance and caused themselves to be insured, lost or not lost, at and from Jamaica to any ports and places at sea or shore a-cruising from port to ports, and place to places, for and during the space of four calendar months, upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the Good-fellow privateer, whereof

whereof was master for that voyage Peter Joyce, beginning the adventure upon the said ship, &c. from the 14th day of June then last, until the said ship, with all her said tackle, apparel, &c. should be arrived at any ports and places a-cruising from port to ports, and place to places, for the space of four calendar months, the said ship, &c. to be valued (one half-part of the ship) at 1000*l.*; and the perils which the assurers took upon them in that voyage were of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counterpart, surprisals, and all other losses which had or should come to the damage of the said ship, &c. the consideration paid by the assured being 26 guineas *per cent.* the assurers being free from average. And the plaintiff farther states, that the assurance so made was made on account of and in trust for Peter Joyce, and that the interest which the said Peter Joyce at the time of making the said insurance and during the cruise after-mentioned had in the said ship, being a privateer, amounted to a large sum of money, and that the said ship, on the said 14th day of June, being at Jamaica aforesaid, set sail and departed thence in and upon her said intended voyage a-cruising, according to the intention of the said policy, and from and after that day was a-cruising from port to ports, and place to places, until the

the said ship afterwards, and within the said four calendar months, then sailing upon the high-seas, and at a great distance from Jamaica, and proceeding in her said voyage, was in a mutinous manner, by force and arms, against the will of the then master and officers of the said ship, seized, taken, restrained, and detained, by the greatest part of the mariners then on board, and the command, direction, and government thereof, were taken from the said master, and the said ship was not permitted to sail and proceed in her said voyage a-cruising any longer, but was then and there, against the will of the said master and officers, by the said mariners, in a mutinous manner, carried back again to Jamaica, where the said mariners, against the will of the said master and officers, ran away from the said ship, with the boat belonging to the same ship, and totally deserted her, whereby the said ship did not, and could not, perform her said voyage a-cruising for the said four calendar months, according to the intention of the said policy; but from that time was totally disabled to perform the same, whereby the owners of the said ship totally lost all profit and advantage which might have accrued to them in and from the said cruise, during the residue of the said four calendar months.

The defendant pleaded the general issue: and at the sittings in London after Hilary term

1748

1748 the cause was tried before chief-justice Lee by a special jury, who in effect found the facts above stated; and also that the said ship, on the 10th of July 1744, in her said cruise, took a French ship, with money and goods on board, to the value of 4200*l.* as a prize, and that the ship arrived at Jamaica on the 29th of September 1744, and was there in safety at and after the end of the said four months.

The special verdict was argued in the court of king's bench in Easter term 1750, when the court (Lee, Wright, Denison, and Foster) unanimously gave judgment for the plaintiff. This judgment was reversed by the court of exchequer chamber, whose judgment of reversal was affirmed by the house of lords in 1754. The house of lords directed the judges to deliver their opinions on two questions, which are stated in the following speech of Mr. justice Foster in the house, taken from his own notes.

"Your lordships' first question is, *Whether* "*the facts found by the special verdict in this* "*cause amount to a breach of the policy of* "*insurance, upon which the action is brought?* "And I am of opinion that the facts found "amount to a breach of the policy.

"A great deal hath been said, and many "foreign authors have been cited, to shew, "that an insurance is, what the foreign authors "call

" call *aversio periculi*, a contract for indem-
" nity, and not for profit.

" This principle will not be denied by me.
" The success of the adventure is not the ob-
" ject of the insurance. The question in these
" cases is not, Did the insured upon the whole
" gain or lose by the adventure, be it a trading
" or a cruising voyage? but, did any of the
" perils insured against happen during the
" voyage, or did they not? And therefore the
" success of the ship, in the present case, in the
" former part of the cruise, and the great prize
" taken by her, must be entirely laid out of the
" case; although the defendant seems to lay
" great stress upon it by the very peculiar man-
" ner of printing the case.

" I take an insurance to be a contract, by
" which the insurer, in consideration of a sum
" of money paid to him by the insured, under-
" takes to pay a stipulated sum, if a certain
" event or contingency, in which the insured
" hath an interest, shall happen. This I take
" to be the nature of all insurances: and in
" these contracts the nature of the risque, and
" the quantum of the sum to be paid by the
" insurer upon the event, are always taken into
" consideration; and by a comparison of these
" the premium to be paid by the insured is
" adjusted.

" In an insurance on the life of a man for

" any

" any given time, the insurer, in consideration " of the premium, which is always adjusted by " the nature and extent of the risque, and the " quantum of the sum insured, undertakes to " pay a certain sum, if the life shall die within " a certain stipulated time. In this case, if the " life shall die but an hour before the stipulated " time is expired, the insurance is broken; for " the event insured against hath happened " within the time.

" So in the case of insurances of houses " against fire for any given time. If the acci- " dent happen but a day within the time, the " value agreed on must be paid.

" The case of an insurance on a life reminds " me of a case which may often happen, and " may serve for an answer to the observations " made about the success of this ship in the for- " mer part of the cruise, and the great prize " which she took. A man hath a legacy given " to him payable at the age of 21, to go over " to a third person in the case of his death be- " fore that age. He in the last year of his " minority insures 1000*l.* on his life for one " year. He overlives the time when the legacy " becomes due, but dies before the end of the " year. The policy is broken, and the 1000*l.* " must be paid, without any regard to the bene- " fit accruing by the legacy.

" With regard to a ship insured for time,

" which

" which is the present case, I take the law to
" be the same as in the other cases which I have
" mentioned. If she be lost within the time
" agreed on, the policy is broken, and the value
" agreed on becomes due.

" The principle on which the law goes in all
" these cases I take to be this. The insured,
" having purchased an indemnity *for the whole*
" *time agreed on*, is strictly entitled to that in-
" demnity. It is *an entire indivisible contract:*
" the premium is given for the entire risque;
" and that risque is certainly increased by the
" length of time which it hath to run. Every
" day adds to it; for no man knows what a day
" may bring forth. If this be so, the single
" question in the present case is, Hath there,
" or hath there not, been a loss within the in-
" tent and meaning of the policy?

" Great pains have been taken to prove,
" that the insurance in the present case is on
" the ship; and your lordships' eyes are direct-
" ed to the word SHIP in the manner of print-
" ing the defendant's case. I admit, that the
" policy is an insurance on the ship, her tackle,
" &c. I contend, however, at the same time,
" that it is not on the bare existence of the
" ship, but on the free use of the ship for the
" purpose of cruising during the whole time
" mentioned in the policy: for if the bare ex-
" istence of the ship, and not the use of her

" for

" for the purpose of cruising, were the object " of the insurance, many of the perils in the " policy, particularly, *arrests, restraints, and " detainments of kings and princes,* stand for " nothing at all; because in these cases the ship " exists in safety, the property is not altered, " and yet she is utterly lost to the owners for " all the purposes of the cruise.

" The special verdict finds, that the ship " was insured for four calendar months against " all the perils mentioned in the policy. One " of these perils is barratry of the master and " mariners. It finds, that on the 23d of Sep- " tember the crew mutinied against the captain " and other officers, seized the ship and carried " her back by force towards Jamaica, and on " the 29th of September deserted her, carrying " with them the boat, fire-arms, and cutlasses, " belonging to the ship, *by which the said " voyage and cruise were totally prevented " and lost for all the remainder of the time.*

" The question then is, Was this mutiny " and desertion an act of barratry? It un- " doubtedly was; for every instance of fraud or " force, to the loss or detriment of the ship, in " the master or mariners, is an act of barratry. " Did it happen during the cruise, or during the " stipulated time? It did. Was the cruise, by " reason of this act of barratry totally lost for " all the remainder of the time? The jury,

" who

" who are the sole judges of matters of fact, " have found that it was.

" This state of the case brings it directly " within the rule laid down in the case of " Depaiba and Ludlow in Comyns 360, and " within the principle which governed that " case. There the ship was in safety, the pro- " perty was never altered; and yet, because the " peril insured against happened in the voyage, " by which the voyage was lost, the plaintiff " recovered.

" It brings it too within the reason of the " cases cited by the plaintiff's counsel, and re- " ferred to in his printed case; especially, Bar- " clay against Collier, and Hanbury against " King. These cases, it is true, are modern " cases, and were ruled at *nisi prius* by a single " judge[x]: but I beg leave to say, that they were " determined by a judge of very extensive know- " ledge in the law, and of great and long expe- " rience in questions of this kind; and their " authority is not denied by the counsel for the " defendant.

" But it is objected, that although the cruise " was lost within the four months, yet the " plaintiff ought not to recover, because the " verdict finds, that *at and after the expira-* " *tion of that time the ship was in safety;* so

[x] Sir William Lee.

" that here is, say they, only a partial loss " found, and the insurance was to be *free from* " *all average.*

" I take it, that averages in a policy of this " kind must signify all such small and partial " losses happening to the ship, *whereby the* " *object of the insurance is not totally lost.* " What then was the object of this insurance? " It was, I beg leave to repeat it, the ship, and " the free use of the ship for the purpose of " cruising: and the jury have found, that this " free use of the ship for the purpose of cruis- " ing was taken from the owners, and totally " lost for all the remainder of the time.

" It hath been said, that the ship having " been in safety, and the cruise having been " prosecuted for the greatest part of the time, " the whole time elapsed before the mutiny " ought to be brought into average with the " time which was lost: and in that light here " was only a partial or average loss.

" To this it is sufficient to say, as I said be- " fore, that the contract is an entire contract " for the whole time. The insured hath, for a " very high premium, in this case, a little more " than 63 *per cent.* by the year, purchased an " indemnity for the whole time; and unless he " hath such indemnity he is injured. Besides, " the construction contended for was never " thought of before in the case of an insurance

" for

" for time; and I call upon those who would " now make that construction to shew a single " writer on our own law, or any foreign author, " who hath said, that the time elapsed before " the event was ever brought into average upon " an insurance for time.

" For these reasons I am of opinion, that the " facts found by the special verdict in this cause " amount to a breach of the policy of insurance, " upon which the action is brought.

" Your lordships' second question is, *Whe-* " *ther the want of an averment in the declara-* " *tion, that the plaintiff, or Peter Joyce, was* " *interested in the cruise therein mentioned,* " *is an error in this record?*

" This objection was not, as I remember, " taken, when this special verdict was argued " in the king's bench: but the short answer " to it, I think, is, That the ship, and *the free* " *use of her during the cruise*, are the objects " of the insurance: and if that be so, it is aver- " red, that Peter Joyce the master had an in- " terest in the ship during the cruise, which I " conceive to be sufficient."

It appears by the journals of the house of lords[y], that only eight of the judges delivered their opinions on the questions proposed by the

[y] See the Lords Journals, XXVIII. p. 179. 188. 195. 202. 206. 213. 214. 216. 220. 225. 226. and 5 Brown's Cases in Parliament, 131—144.

lords. Three of them were Wright, Denison, and Foster, of the court of king's bench, who supported the judgment given by that court; and the remaining five were Parker, Smythe, and Adams, of the court of exchequer, and Clive and Birch of the court of common pleas, who spake against that judgment. Chief-justice Lee was prevented by illness from attending, and died in a short time after the judgment given by the house of lords. This judgment, affirming the reversal in the exchequer chamber, gave great concern and uneasiness to this most respectable judge, but none to Mr. justice Foster. Knowing that he had formed his opinion with great care and caution, Mr. justice Foster was perfectly satisfied. He concurred in sentiment with the earl of Nottingham, who, near the conclusion of his second argument in the duke of Norfolk's case, thus nobly expresseth himself. "I have taken as "much pains and time as I could to be informed; "I cannot help it, if wiser men than I be of "another opinion. I have made several decrees "since I have had the honour to sit in this "place, which have been reversed in another "place; and yet I was not ashamed to make "them, nor sorry when they were reversed by "others."

At the Lent assizes for Surrey, in 1758, an indictment against Martha Gray, the keeper of East-

East-Sheen gate in Richmond-park, of which park the princess Amelia, daughter of king George II. was then the ranger, for obstructing at that gate a common footway through the park, was tried before Mr. justice Foster, who greatly distinguished himself on the occasion by his firmness and integrity. I am happy to have it in my power to give a particular account of the proceedings at the trial, written at the time by a learned lawyer, who hath since filled the highest station in the profession. Mr. Thurlow, now lord Thurlow, wrote the following letter, the original of which is in my possession, to Mr. Ewen, a nephew of Mr. justice Foster, then, and for many years afterwards, clerk of the peace for Wiltshire.

" Dear Sir,

" I write, at the hazard of your thinking me " impertiment, to give you the pleasure of " hearing that of your uncle which in all pro- " bability you will not hear from him; I " mean, the great honour and general esteem " which he has gained, or rather accumulated, " by his inflexible and spirited manner of trying " the Richmond cause, which has been so long " depending, and so differently treated by other " judges. You have heard what a deficiency " there was of the special jury, which was im- " puted to their backwardness to serve a prose-

" cution

" cution against the princess. He has fined all
" the absenters 20*l.* a-piece. They made him
" wait two hours, and at last resort to a *tales.*
" When the prosecutors had gone through part
" of their evidence, sir Richard Lloyd, who
" went down on the part of the crown, said,
" that it was needless for them to go on upon
" the right, as the crown was not prepared to
" try that, this being an indictment which could
" not possibly determine it, because the ob-
" struction was charged to be in the parish of
" Wimbleton, whereas it was in truth in Mort-
" lake, which was a distinct parish from Wim-
" bleton. They maintained their own poor,
" upheld their own church, and paid tithes to
" their own parson; and Domesday-book men-
" tions Mortlake. On the other side, it was
" said, that Domesday-book mentions it as a
" baron's fee, and not as a parish; and that
" the survey in the time of Henry VIII. men-
" tions Wimbleton *cum capellis suis annexis,*
" and also that a grant of it in the time of Ed-
" ward VI. makes a provision of tithes for the
" vicar to officiate in the chapel of Mortlake.
" The judge turned to the jury, and said, he
" thought they were come there to try a right,
" which the subject claimed to a way through
" Richmond-park, and not to cavil about
" little low objections, which have no relation
" to that right. He said, it is proved to be in
" Wimbleton

" Wimbleton parish; but it would have been " enough if the place, in which the obstruction " was charged, had been only reputed to be in " Wimbleton, because the defendant and jury " must have been as sensible of that reputation " as the prosecutors; but had it not been so, " he should have thought it below the honour " of the crown, after this business had been " depending three assizes, to send one of their " select counsel, not to try the right, but to " hinge upon so small a point as this. Upon " which, sir Richard Lloyd made a speech, " setting forth the gracious disposition of the " King in suffering this cause to be tried, which " he could have suppressed with a single breath, " by ordering a *nolle prosequi* to be entered. " The judge said, he was not of that opinion. " The subject is interested in such indictments " as these for continuing nuisances, and can " have no remedy but this, if their rights be " encroached upon; wherefore he should think " it a denial of justice to stop a prosecution for " a nuisance, which his whole prerogative does " not extend to pardon. After which, the evi- " dence was gone through; and the judge " summed up shortly, but clearly, for the pro- " secutors[z].

[z] The defendant was convicted. See 2 Bur. 908, 909.

" It

"It gave me, who am a stranger to him, "great pleasure to hear, that we have one "English judge, whom nothing can tempt or "frighten, ready and able to hold up the laws "of his country as a great shield of the rights "of the people. I presume that it will give "you still greater to hear, that your friend "and relation is that judge: and that is the "only apology I have to make for troubling "you with this.

"I am, dear sir,

"your most humble servant,

"E. THURLOW."

"*Fig-tree-court, Inner Temple,*
April 11, 1758."

In 1762, proceedings were had in a cause of great consequence and great expectation, which had been depending many years; I mean the cause between the city of London and the protestant dissenters. By a bye-law of the city made in 1748 it is provided, That if any person, being nominated to serve the office of sheriff, should decline to stand the election of the common-hall, he should be subject to a fine of 400*l.* and 20 marks; and that if any person, being elected by the common-hall, should refuse to serve the office, he should be subject to a fine of 600*l.* These fines were appropriated to defraying the expence of the mansion-

sion-house. Many dissenters were nominated and elected to the office of sheriff, and fines to the amount of 15,000*l.* and upwards were exacted of them. Some at length refused to pay the fines; and actions were brought against them in the name of the chamberlain of the city in the sheriffs' court of London; and, after many delays, the question was brought to a decision in the case of Allen Evans, esq. and judgment was given for the plaintiff in September, 1757. Mr. Evans, who, in bar of the action, had pleaded his disability by the corporation-act 13 Car. II. st. 2. c. 1. and his protection by the toleration-act 1 W. & M. sess. 1. c. 18. brought the cause before the court of hustings, another city-court, and the judgment was affirmed by the recorder in 1759. The defendant, by writ of error, brought the cause before the court of commissioners-delegates, who were, chief-justice Willes, chief-baron Parker, Mr. justice Foster, Mr. justice Bathurst, and Mr. justice Wilmot. Chief-justice Willes died before judgment given; and the other commissioners delivered their opinions *seriatim*, July 5, 1762, and unanimously reversed the judgments of the city courts. Mr. justice Foster's argument, which is very accurate and decisive, I communicated to my late excellent friend Dr. Furneaux; and he hath inserted it in the appendix to the second edition of his

Letters

Letters to Mr. justice Blackstone, printed in 1771. This judgment of reversal was afterwards, February 4, 1767, unanimously affirmed by the house of lords, on the motion of lord Mansfield[a], whose admirable speech on the occasion is also inserted by Dr. Furneaux in his appendix. This speech, which is of considerable length, Dr. Furneaux, who was happy in a most retentive memory, brought away in his head from the house of lords.

About the time of delivering his opinion in the last-mentioned case, Mr. justice Foster published his book, intitled, *A Report of some proceedings on the commission for the trial of the rebels in the year* 1746, *in the county of Surrey; and of other crown-cases: to which are added, Discourses upon a few branches of the Crown-law:*—which will be to him MONUMENTUM ÆRE PERENNIUS. The impression being large, and a pirated edition being made in Ireland, a new edition was not soon wanted in England; but in 1776 I published a second edition with some improvements, and with remarks in my preface on some objections made by Mr. Barrington in his Observations on the more antient Statutes; and in 1792 I published

[a] See the Lords Journals, XXXI. p. 293. 349. 436. 457, 458, 459. 461. 470. 475. Furneaux's Appendix, and Burn's Ecclesiastical Law, tit. DISSENTERS.

a third

a third edition, with an appendix, containing three new cases, which the author had intended to insert in the first edition, and had caused to be transcribed for that purpose. Two of them, on which I have above enlarged, were omitted by the advice of friends; and the third, which is the case of a woman indicted on the statute 7 and 8 W. III. c. 41. for having in her custody divers pieces of canvas marked with the king's mark, she not being a person employed to make canvas for the king's use, was omitted in consequence of the omission of the case of John Bell, with which, in some of its circumstances, it hath a resemblance. In my preface to the third edition, I have given my reasons for publishing these cases.

Mr. justice Foster was blessed with a good constitution; and he generally enjoyed a good state of health, until some few years before his death. In no long time after the death of lady Foster, his health began to decline, and he complained of a loss of appetite, which made it necessary for him occasionally to spend some time at Bath. He received considerable benefit from the use of the Bath waters; but, wheresoever he was, he was patient and resigned, composed and cheerful; rejoicing in the glorious prospect beyond the grave, which christianity opened to his view. In Hilary, Easter, and Trinity terms,

1763,

1763, he seldom attended at Westminster-hall. He was confined to his bed a short time only; and, on Monday the 7th of November, being the first day of Michaelmas term in that year, he easily and calmly expired. He never had any children; but he had three sisters, who survived him, and were the mothers of his three nephews and executors, Michael Ewen, Michael Dodson, and Samuel Hawkes. By his own direction, he was buried in the parish-church of Stanton-Drew, in Somersetshire, where lady Foster had been buried. In that church, a plain monument is erected with this inscription:

Here is interred
The body of sir Michael Foster,
One of the judges of the court of king's bench;
Who was born December 16, 1689,
And died Nov. 7, 1763.
Dame Martha his wife,
The eldest daughter of James Lyde, esq. is also here interred.
She died May 15, 1758,
in the 57th year of her age.

It is unnecessary, and it would perhaps be improper, for me to attempt to draw his character at length. I have exhibited the most decisive proofs of his ability, of his candour, and

and of his integrity[b]; and I will only add in his own words[c], which he hath used in speaking of his intimate and highly-valued friend Mr. justice Abney, "when he died, the world lost "a very valuable man, his majesty an excellent "subject, and the publick a faithful able ser-"vant;

"*Nec me meminisse pigebit.*"

M. Dodson.

Boswell-court, Nov. 7, 1795.

[b] The compliment paid to Mr. justice Foster by the celebrated Churchill, in his Rosciad, ought not to be omitted:

"Each judge was true and steady to his trust;
"As Mansfield wise, and as old Foster JUST."

[c] See his Crown Law, 76.

THE END.

Printed by J. Nichols and Son,
Red Lion Passage, Fleet-street, London.